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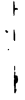
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THE
AMERICAN
RAILWAY REPORTS:

A COLLECTION OF
ALL REPORTED DECISIONS RELATING TO
RAILWAYS

BY
JOHN A. MALLORY
OF THE NEW YORK BAR

VOL. IV

NEW YORK
JAMES COCKCROFT & COMPANY
1875

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AMERICAN RAILWAY REPORTS.

THE NEW HAVEN & DERBY RAILROAD COMPANY *v.* CHAPMAN.

38 *Connecticut*, 56.

Supreme Court of Errors of Connecticut; February Term, 1871.

Incorporation. Organization. The act incorporating a railroad company with a capital of five hundred thousand dollars, authorized the incorporators named in the act to call the first meeting of the stockholders whenever one hundred thousand dollars or more of the capital stock should have been subscribed for, "to choose directors and perfect the organization of said corporation." A subsequent clause provided that "whenever said corporation shall have been so organized, it may proceed to commence the construction of the railroad hereinafter specified." More than one hundred thousand dollars having been subscribed to the stock, and a meeting of the stockholders called, directors elected, and the construction of the railroad commenced,—*Held*, that the fact that the whole capital had not been subscribed for, was no defense to an action by the corporation upon subscriptions to the stock. The provisions of the act of incorporation above cited, could not be construed to require the directors to fill up the stock by procuring further subscriptions, before proceeding with the business for which the corporation was created. The language employed,—“to perfect the organization,”—included merely the choice by the stockholders, and the qualification of the necessary officers; and when so organized, in conformity with the charter, the corporation might legally begin the exercise of its franchise.

The act incorporating a railroad company, with a capital of five hundred thousand dollars.—1

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ired thousand dollars, provided that there should be at least nine directors of the company. After subscriptions to the capital stock amounting to two hundred and sixteen thousand seven hundred dollars, had been made, an amendment to the act of incorporation was passed, authorizing a certain city to subscribe two hundred thousand dollars to the capital stock, but providing that two of the officers of the city should be directors of the company, and that in meetings of the stockholders, the city should be entitled to only one vote for every four shares of stock owned by it. *Held*, that the fact that, by the acts of the corporation, in accepting this amendment, and in permitting the city to subscribe for the stock upon the terms stated, the previous subscribers were deprived of the privilege of voting for the two directors appointed by the city, did not discharge such previous subscribers from the obligation of their subscriptions. The rights of which they were deprived were held by them subject to such reasonable changes and regulations as the legislature might make with the assent of the corporation.

Such an amendment does not belong to the class of laws affecting corporations, which, because they work a radical change in the nature and character of a corporation, or in the purpose for which it was created, are held not binding upon non-consenting members, although assented to by a majority. No change was effected in the character of the corporation, which still remained a railroad company, relating to an important public improvement. The object of its creation, —the construction and operation of a railway,—remained precisely the same. The change made in the mode of appointing the directors was not a radical one, nor, under the circumstances, was it an unreasonable one; and so far from working an injury to previous subscribers, it was a benefit to them. The object of the amendment was not to obstruct, hinder, or change, but to facilitate the enterprise in which all were engaged.

Case reserved for the advice of the supreme court of errors of Connecticut, by the court of common pleas in New Haven county.

This was an action of assumpsit by the New Haven & Derby Railroad Company against Chapman, to recover for subscriptions made by him to the plaintiff's capital stock. A similar case by the same plaintiff against one Barker, involving the same question, was argued at the same time. Upon trial in the com-

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mon pleas, the following facts were found by the court :

The plaintiffs were incorporated by the legislature of the state of Connecticut, at its May session, A. D. 1864, with the powers embraced in their charter. Priv. Acts of 1864, 188, 189, 190, 191.

Upon the petition of the city of New Haven, the legislature, at its May session, A. D. 1867, passed a resolution authorizing the city of New Haven to subscribe to the capital stock of the company (Priv. Acts of 1867, 48, 49, 50); the plaintiffs were not petitioners therefor; but the attorney of the company, with the knowledge of all the persons constituting the board of directors, aided in the prosecution of the petition, and in a hearing thereof before a committee of the General Assembly, and was subsequently paid for his services by the company. There was no vote of the board or of the corporation authorizing said services, but the president of the company and a majority in number of the directors were present, aiding and assisting the attorney in the prosecution of the petition—acting, however, without corporate vote or vote of the board in that behalf.

Upon petition of the city of New Haven, a public act was passed by the legislature, at its May session, A. D. 1869 (Acts of 1869, 232, 233), and the recital or whereas clause, preceding the enacting clause of said public act, is in fact true.

The resolution passed at the May session of the General Assembly, 1867, hereinbefore mentioned, was approved by a vote of the freemen of the city of New Haven on June 17, A. D. 1867, at a meeting called for that purpose by the court of common council of the city; after such approval the city of New Haven did, on June 20, A. D. 1867, subscribe for and take two thousand shares of the capital stock of the company, which stock has been paid for in full by the city.

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After the city made said subscription and payment, the city voted and participated by its mayor, or other agent, in all the meetings of the stockholders of the company, in manner as prescribed in the third section of said resolution, and particularly voted for the election of directors at the annual meetings of stockholders, held in the years 1867, 1868, 1869, and 1870, and also participated in sundry special meetings of the stockholders of the company, held in each of said years respectively, at which business of vital importance to the company was transacted, and upon which the city voted by its mayor or agent as aforesaid.

The mayor of the city for the time being, and one of the aldermen annually designated by the court of common council for that purpose, acted as directors of the railroad company in all the meetings of the board of directors held since the date of said subscription, to wit: since June 20, A. D. 1867, claiming authority to so act, by virtue of the third section of said resolution, and by virtue of no other appointment to the office of director whatsoever; and they have never been elected to the office of director by the stockholders, or in any other way appointed to said office.

The mayor and alderman so designated, voted and acted upon important business of the company transacted in the meetings of the board; and acted upon important committees of the board, to which business vitally affecting the interests of the road was referred, at times presided *pro tem.* at meetings of the board, and have been, in all respects, as active and potential in the transaction of the business of the board, and in the management and direction of the affairs of the company, as the other directors have been.

The railroad company has never accepted by any vote, resolution, or action of its stockholders in any stockholders' meeting, or of its board of directors, the resolution of 1867, as an amendment to its charter, but

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has acted as if the same were a valid amendment to its charter ; and the city of New Haven has acted as if the same were a valid amendment to the charter of the city ; and the mayor and alderman have also so acted, in claiming to be, and in acting as, directors of the company.

The stockholders of the company had no opportunity to participate in the election of the mayor and alderman as city directors, but to vote only for a number of directors less by two than they otherwise would or could have voted for ; the defendant, Chapman, has never acquiesced in the appointment of the city directors, and has claimed that they were not legally appointed members of the board of directors.

The defendants, though freemen of the city of New Haven at the time said resolution was approved by vote of the freemen of the city, did not vote upon the question of approval or disapproval. The company made ten calls, of ten per cent. each, on the stock subscriptions to its capital, payable respectively, and in that order, on May 15 and June 15 in the year 1867, and on January 15, February 15, March 15, May 15, June 15, July 15, August 15, and September 15 in the year 1868 ; the defendant Chapman paid the first two installments so called for, on the days they respectively fell due, to wit : on May 15 and June 15 in the year 1867, but refused to pay all the other installments ; he has never participated in any stockholders' meeting of the company, or held any office therein since its organization, and did not know, at the time he paid said two stock installments, that the capital stock of the company had not been fully subscribed for.

The plaintiffs obtained, before April 24, A. D. 1867, sundry subscriptions to their capital stock, among which are the subscriptions of the defendants ; and, on the last mentioned day, the company, in first meeting

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of stockholders, elected a board of directors, and perfected their organization, having at that time subscriptions to their capital stock of two hundred and sixteen thousand seven hundred dollars; the city of New Haven afterwards subscribed, as hereinbefore mentioned, on June 20, A. D. 1867, two hundred thousand dollars to their capital stock, and the total amount of subscriptions to the capital stock of the company is still considerably, substantially, and materially short of five hundred thousand dollars.

In November, A. D. 1867, the plaintiffs, by their directors, said mayor and alderman acting with the board, put their road under contract for construction throughout its entire length; large sums of money have been expended in the work of construction, and further large sums will be required for the completion of said railroad; the company has issued bonds to a large amount, and secured the same by a first mortgage on all its property, except certain property contained in a second mortgage, hereinafter mentioned; a large amount of the first mortgage bonds has been already expended in the construction of the railroad; and an additional amount of the bonds will be issued, and expended in the completion and equipment of the road. The company has also made and executed, under and in pursuance of said public act of 1869, its further bonds to a large amount, which have been guaranteed by the city of New Haven, and are called guarantee bonds; to secure and indemnify the city for which guarantee, the company created a second mortgage on all the property of the company included in said first mortgage, and also on other property of the company, consisting of lands and buildings in the city of New Haven, which is not included in said first mortgage; the last mentioned mortgage is a first mortgage upon said lands and buildings in the city of New Haven, and a second mortgage upon all other property

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of the company ; a large amount of guarantee bonds has already been expended in the construction of the railroad and an additional amount will be so issued and expended. The total cost of the railroad, when completed and equipped, will considerably exceed the sum of five hundred thousand dollars ; the two mortgages before mentioned taken together, now are and will be at the time of the completion of the road, larger in amount, by the sum of eighty-three thousand three hundred dollars, than they would have been if subscriptions to the capital stock of the company to the amount of five hundred thousand dollars had been obtained and paid.

The defendant Chapman subscribed two shares, of one hundred dollars each, to the stock of the company, on which eight installments of twenty dollars each are due and unpaid.

In the action against Barker, the court found the following facts :

The defendant, in March, A. D. 1867, subscribed for three shares of the capital stock of the company, of one hundred dollars each, paid the first installment called for on the day the same became due, to wit, on May 15, A. D. 1867 ; paid the second installment called for on September 30, A. D. 1867, and has since paid no other installments. He participated in the stockholders' meetings of the company, after the city subscription to the capital stock of the company, with knowledge that the resolution authorizing said subscription had been passed by the legislature and approved by a vote of the freemen of the city ; and he had such knowledge at the time he paid the second installment, on September 30, 1867.

Upon these facts, both cases were reserved for the advice of the supreme court of errors.

H. B. Harrison, for the plaintiff.

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Starr v. Pease, 8 *Conn.* 541; *Pratt v. Allen*, 13 *Id.* 119; *Northern R. R. Co. v. Miller*, 10 *Barb. (N. Y.)* 260; *Buffalo, &c. R. R. Co. v. Dudley*, 14 *N. Y.* 336; *Re Oliver Lee's Bank*, 21 *Id.* 20, 21; *Meadow Dam Co. v. Gray*, 30 *Me.* 549; *Agricultural Branch R. R. Co. v. Winchester*, 13 *Allen (Mass.)* 29; *Pacific R. R. Co. v. Renshaw*, 18 *Mo.* 210; *Midland R. Co. v. Gordon*, 16 *Mees. & W.* 804; *Ang. & A. on Corp.* ch. 2, § 7; *Gen. Stat.*, tit. 7, ch. 7, § 443, *et seq.*; ch. 6, § 240; *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 *N. Y.* 102; *Burlington, &c. R. R. Co. v. White*, 5 *Iowa*, 409; *Sparrow v. Evansville, &c. R. R. Co.*, 7 *Ind.* 369; *Barrett v. Alton, &c. R. R. Co.*, 13 *Ill.* 504.

Wright & Watrous, for the defendants.

1. The plaintiffs can not prevail against the defendants, because the whole capital of five hundred thousand dollars required by the charter had not been subscribed when the installments sought to be recovered were laid; nor has the same since been subscribed. *Gen. Stat.* 487, § 12; 170, § 393, *et seq.*; 141; *Ang. & A. on Corp.* §§ 110, 556; *Redfield on Railways*, ch. 4, § 1, p. 18; ch. 3, § 3, p. 65; *Anderson v. Newcastle, &c. R. R. Co.*, 12 *Ind.* 376; *Matty v. Northwestern Virginia R. R. Co.*, 16 *Md.* 422; *Redfield on Railways*, ch. 4, § 1, p. 18, (2,) (6.) *Walker v. Devereaux*, 4 *Paige (N. Y.)* 239; *Hartford, &c. R. R. Co. v. Kennedy*, 12 *Conn.* 499; *Shurtz v. Schoolcraft, &c. R. R. Co.*, 9 *Mich.* 272; *Salem Mill Dam Co. v. Ropes*, 6 *Pick. (Mass.)* 23; *S. C.*, 9 *Id.* 187; *Stoneham Branch R. R. Co. v. Gould*, 2 *Gray (Mass.)* 277; *Troy, &c. R. R. Co. v. Newton*, 8 *Id.* 596, 602, 603; *New Hampshire Central R. R. Co. v. Johnson*, 10 *N. H.* 390, 407; *Cabot, &c. Bridge Co. v. Chapin*, 6 *Cush. (Mass.)* 52; *Lewey's Island R. R. Co. v. Bolton*, 48 *Me.* 455; *Oldtown, &c. R. R. Co. v. Veazie*, 39 *Id.* 571; *Penobscot R. R. Co. v. White*, 41 *Id.* 512; *Peoples' Ferry Co. v.*

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Balch, 8 *Gray* (Mass.) 303, 311; Atlantic Cotton Mills v. Abbott, 9 *Cush.* (Mass.) 423, 426; *Redfield on Railways*, ch. 4, § 1, p. 18, (2,) note 3; ch. 9, § 5, p. 51, *et seq.*; ch. 7, § 1, p. 30, (1); Nutter v. Lexington, &c. R. R. Co., 6 *Gray* (Mass.) 88; Central Turnpike Co v. Valentine, 10 *Pick.* (Mass.) 142; Lexington, &c. R. R. Co. v. Chandler, 13 *Metc.* (Mass.) 311; White Mountains R. R. Co. v. Eastman, 34 *N. H.* 145; Schenectady &c. Plank Road Co. v. Thacher, 11 *N. Y.* (1 *Kern.*) 107; *Ang. & A. on Corp.* § 543; Mann v. Cook, 20 *Conn.* 178; Brown v. Illius, 27 *Id.* 84; New York, &c. R. R. Co. v. Ketchum, *Id.* 170; *Ang. & A. on Corp.* § 542; Danbury, &c. R. R. Co. v. Wilson, 22 *Conn.* 449; Lane v. Brainerd, 30 *Id.* 565; Marlborough Manuf. Co. v. Smith, 2 *Id.* 579; Hepburn v. Griswold, 8 *Wall.* 607; Contoocook Valley R. R. v. Baker, 32 *N. H.* 369-372; *Redfield on Railways*, ch. 9, § 51, (3); Wontner v. Shairp, 4 *Man. G. & S.* 404, 441; Pritchford v. Davis, 5 *Mees. & W.* 2; Howbeach Coal Co. v. Teague, 5 *Hurl. & N.* 151; McCully v. Pittsburgh, &c. R. R. Co., 32 *Pa. St.* 25, 31, 32; Pittsburgh, &c. R. R. Co. v. Graham, 36 *Id.* 77; Commonwealth v. Cullen, 13 *Id.* 133, 141-144.

2. Any change or alteration of the charter after subscription to the stock, which fundamentally varies the character, structure, or purposes of the corporation, or the manner of accomplishing those purposes, is a change in the contract of subscription, which releases the subscriber from his obligation to take and pay for the stock subscribed for, notwithstanding a reservation of power to alter or amend the charter. Hamilton Mut. Ins. Co. v. Hobard, 2 *Gray* (Mass.) 548; Oldtown, &c. R. R. Co. v. Veazie, 39 *Me.* 571, 581; Commonwealth v. Essex Co., 13 *Gray* (Mass.) 253; Allen v. McKeen, 1 *Sumn.* 276; *Ang. & A. on Corp.* § 767, 536, 537, 541; Thompson v. Guion, 5 *Jones Eq.* 113; McCray v. Junction R. R. Co., 9 *Ind.* 358;

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Marietta, &c. R. R. Co. v. Elliott, 10 *Ohio St.* 57, 62; Barnes v. Smith, 10 *N. Y.* 550; Troy, &c. R. R. Co. v. Kerr, 17 *Barb. (N. Y.)* 604; Kenosha, &c. R. R. Co. v. Marsh, 17 *Wis.* 143; Sage v. Dillard, 15 *B. Monr. (Ky.)* 341, 348-360; Booe v. Junction R. R. Co., 10 *Ind.* 93; Zabriskie v. Hackensack, &c. R. R. Co., 18 *N. J. Eq.* 178; Delaware R. R. Co. v. Thorp, 5 *Del.* 454; Woodruff v. State, 3 *Ark.* 285; Herrick v. Randolph, 13 *Vt.* 525; Everhart v. Westchester, &c. R. R. Co., 28 *Pa. St.* 339, 352, 353; Hartford, &c. R. R. Co. v. Croswell, 5 *Hill, (N. Y.)* 383; Dartmouth College v. Woodward, 4 *Wheat.* 518; Sheriff v. Lowndes, 16 *Md.* 357; Norris v. Abingdon Academy, 7 *Gill & Johns. (Md.)* 7; University of Maryland v. Williams, 9 *Id.* 366, 413; Yarmouth v. North Yarmouth, 34 *Id.* 411; Trustees of New Gloucester School Fund v. Bradbury, 11 *Id.* 118; Louisville v. University of Louisville, 15 *B. Monr. (Ky.)* 667; Commonwealth v. Cullen, 13 *Pa. St.* 133; Brown v. Hummel, 6 *Id.* 86; Ellis v. Marshall, 2 *Mass.* 277.

CARPENTER, J.—The plaintiffs were incorporated with a capital of five hundred thousand dollars, with power to call a meeting of the stockholders to choose directors and perfect the organization of the company, whenever the sum of one hundred thousand dollars should be subscribed to the capital stock. The sum of two hundred and sixteen thousand seven hundred dollars was subscribed, when the first meeting of the stockholders was held, and directors chosen. Subsequently the city of New Haven having received authority so to do, subscribed the sum of two hundred thousand dollars more. No other subscriptions were ever made, leaving the sum of eighty-three thousand three hundred dollars unsubscribed for. The directors thereupon proceeded to call in the capital stock thus subscribed, and to commence the construction of the proposed railway.

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The defendant Chapman subscribed for two shares of said stock; and the defendant Barker for three shares. Each of the defendants paid two installments of ten per cent. each, leaving the remaining eighty per cent. due and unpaid. These actions are brought to recover the balance, with interest.

The first ground of defense is that the whole capital of five hundred thousand dollars has not been subscribed for.

There can be no doubt that the policy of the state, up to comparatively a recent period, has been, in corporations of this character, to require that an adequate cash capital for the undertaking should be furnished, before corporations should be permitted to exercise their corporate functions. Hence, in most of the charters hitherto granted, there is no authority for the stockholders to meet and choose directors before all the stock is subscribed. But in the charter before us there is a provision which seems to indicate the inauguration of a different policy. That provision is as follows: "The persons named in the first section hereof, or a majority of them, are hereby authorized to call the first meeting of the stockholders of said corporation, in such way, and at such time and place, as they may appoint, whenever one hundred thousand dollars or more of the capital stock of said corporation shall have been subscribed for, to choose directors and perfect the organization of said corporation." Priv. Acts, vol. 5, p. 653, § 4.

To what extent the legislature intended to change their antecedent policy, is really the question involved. The defendants contend that they only intended, after a certain amount of the capital stock should have been subscribed, to transfer the superintendence of further subscriptions to the stock from the corporators to the directors; and that it was the duty of the directors to fill up the stock. before they could law-

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fully proceed with the business for which the corporation was created. The plaintiffs, on the other hand, contend that the change contemplated was much more radical,—that they intended not only to authorize a meeting for the choice of directors, but that the corporation should at once possess all its powers and franchises, and might immediately proceed with the construction of its road.

The language of the charter seems to import much more than the defendants claim. The phrase, “to choose directors and perfect the organization of said corporation,” in its grammatical construction, obviously relates to the meeting of the stockholders. If interpreted according to its grammatical construction, therefore, it was for that meeting to perfect the organization, as well as to choose directors. We can hardly suppose that the legislature intended that that meeting should then and there fill up the stock, much less can we suppose that they intended that the meeting should continue in session, or otherwise prolong its existence for that purpose. We all know that such a course would have been impracticable. If the language used, therefore, is to be taken in its ordinary grammatical sense, we think it quite clear that they could not have intended, by “perfecting the organization,” the filling up of the capital stock.

If the legislature intended that the directors, when chosen, should perfect the organization by procuring the balance of the stock to be subscribed for, they were certainly unfortunate in the choice of language to express that intention. If the words, “perfect the organization,” relate to the directors at all, it seems reasonable to interpret them as referring to the duty of the directors to choose a president, and to make and prescribe by-laws; or to their power to choose a clerk and treasurer and other officers; for these are duties and powers usually performed and exercised by direct-

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ors; and perhaps we could, without doing violence to the language used, give these words that meaning. While it is only by a forced and unnatural construction, that we can limit and apply them simply to the matter of procuring further subscriptions to the stock.

We see no difficulty, however, in interpreting them as referring to the stockholders' meeting. If so interpreted, they may mean substantially the same thing as choosing directors, embracing such matters as are incidental to and implied from the power to choose directors, such as appointing a chairman, clerk, and tellers, and prescribing rules and regulations for governing their proceedings, and the like. Or they may, and more properly perhaps, refer to the appointment of such officers as are not by law required to be chosen by the directors, such as the vice-presidents, an executive committee, a clerk or secretary, a treasurer, agents, and other officers. It is true some, and perhaps all of these, may be chosen by the directors. The statute authorizes them to choose a clerk and treasurer, but it is not imperative, as in the case of the president. See *Gen. Stat.*, p. 181, § 444. There is certainly some room for the inference that all these officers may be chosen by the stockholders. If so, the words under consideration may properly apply to such proceedings.

The word "organize," as used in railroad and other charters, ordinarily signifies the choice and qualification of all necessary officers for the transaction of the business of the corporation. This is usually done after all the capital stock has been subscribed for. I have been unable to find any case in which it necessarily includes in its meaning the procuring of subscriptions to the capital stock; but I do find cases where manifestly it is not used in any such sense. The corporators of the Boston, Hartford, & Erie Railroad Company were authorized to *organize* the com-

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pany when one-half the stock required should be subscribed. Priv. Acts, vol. 5, p. 543. See also Act amending the charter of the Fairfield County Railroad Company, vol. 4, p. 887.

Again, if the construction contended for by the defendants is the correct one, what is gained by this unusual and extraordinary provision? Can it be claimed that the directors, after a partial organization, will be more successful in obtaining subscriptions than the corporators were before? According to their construction, the corporation can not exist, no corporate act can be done, the object of its creation can not be accomplished, the enterprise contemplated can not be commenced even, until the whole stock is subscribed for. The practical operation of this section, as thus construed, would be simply to take from one set of men the burden of procuring subscriptions, and impose it upon another. Or, quite likely, it would be taking it from one set of men as corporators, and imposing it upon the same men as directors. In all this we discover nothing gained either to the corporation or the public.

On the other hand, considering the difficulty of procuring, in the first instance, the necessary means for the construction of railroads, combined with the necessity and importance of their construction, in order that the resources of the various sections of the state may be more fully developed, we can discover a motive which may have induced the legislature to change, to some extent, their policy in this respect, and to authorize the promoters of such enterprises to commence their corporate existence, and the exercise of the powers and franchises conferred upon them, with only a part of the capital stock required subscribed for.

That this must have been the intention of the legislature, will appear more clearly from a comparison of the last clause of section 4 with other provisions

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in the charter. "And whenever said corporation shall have been so organized, it may proceed to commence the construction of the railroad hereinafter specified." How organized? The defendants say, with the capital stock all subscribed for. If so, what necessity for this provision at all? Section 6 provides as follows: "Said corporation is hereby authorized and empowered to locate, construct, and finally complete, a single, double, or treble railroad or way," &c., from New Haven to Derby.

Here, then, is authority full and ample, which renders the last clause of section 4 nugatory. Now, if we are to construe this charter so as to give effect to all its provisions, we must reject this construction. Moreover, the language of this 4th section is peculiar. It is not that the corporation may proceed from its organization to the construction of its railroad, but it is that it may proceed to *commence* the construction. This is a strong indication that the legislature intended that the work might be commenced with a limited capital, and continued subsequently, as the corporation might obtain the necessary means. We say nothing, of course, as to the expediency of such a policy. That was a question entirely for the legislature. Our duty is to ascertain what they intended, and to give effect to that intention.

A question may arise in respect to some of these charters, more properly, perhaps, in a court of equity, whether the corporation should be permitted to go forward and expend the money subscribed, when it is manifest that the work can not be completed, and that the money expended will be lost. No such question arises in the present case. More than four-fifths of the stock required was actually subscribed for, and the work has been carried forward nearly, or quite, to completion.

We are satisfied, therefore, that these proceedings

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of the corporation were not illegal, and that this branch of the defense can not be sustained.

The defendants further claim that the Act of 1867, authorizing the city of New Haven to subscribe for two thousand shares of the stock, and the proceedings of the city and the plaintiffs under said Act, operate to discharge the defendants from the obligation of their contracts.

The Act authorizing said subscription provides that the mayor of said city, and one of the aldermen to be designated by the common council, shall each be, by virtue of his office, and while said city shall continue to be a stockholder, a director in the railroad company; and that said city shall be entitled to one vote only for every four shares of stock by it owned. In every other respect the stock held by the city is held upon the same terms and conditions as that held by other stockholders.

Before discussing the legal questions involved in this part of the case, it may be well to consider briefly what effect these proceedings have, or have had, upon the rights and interests of the defendants. Are they prejudicial, or otherwise? It is not found that either of the defendants has thereby sustained any actual pecuniary damage. In looking at the case as stated, we think it will be found that the whole injury consists in the fact that the defendants are deprived of the privilege of voting for two of the directors. The statute requires that there shall be not less than nine directors; there may be more, at the discretion of the stockholders. The stockholders therefore elect seven out of the nine directors, and are deprived of the privilege of voting for the other two. On the other hand, the city is prohibited from voting on three-fourths of its stock. In consideration of the privilege of electing two directors, the city agrees that, in all meetings of the stockholders, it will cast but five hundred votes,

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instead of two thousand. The whole number of shares subscribed is four thousand one hundred and sixty-seven. The city subscribed two thousand. The balance, much of it at least, is probably owned in small sums, and by individuals who take little interest in attending the meetings of the stockholders. Thus it will be readily seen that the city, if entitled to one vote on each share of its stock, could exercise a controlling influence in all the meetings of the corporation, and would, if so disposed, elect the whole board of directors. To avoid this, the provision under consideration was adopted. The practical effect of it is to give to fifteen hundred shares, being more than one-third of the entire stock, two-ninths of the directors absolutely, at the same time depriving it of all voting power in the meetings of the stockholders. We can not say that this is unreasonable. It is manifestly for the advantage of the corporation that its affairs should not be virtually controlled by the city. On the other hand, it is just that the city should have a voice in its management. The arrangement seems to us just and reasonable, and, on the whole, beneficial, rather than prejudicial, to the defendants.

The ground of this objection is that the defendants, by their contracts of subscription, acquired certain rights and privileges, of which they have been divested by the amendments to the charter. The contract entitled each defendant to the number of shares subscribed for by him, and obligated him to pay to the corporation the par value of the stock. It also contained an agreement, by implication at least, that the money thus received should be expended in carrying forward the business for which the corporation was created. The subscription was also upon the terms and conditions contained in the charter. We may therefore say that the contract contained an agreement, that the defendant should have all the rights

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and privileges conferred upon him, as a stockholder, by the charter, as it then was, and until those rights were changed or modified, by his consent, or by lawful authority. One of the conditions of the charter, and also of the general law of the state under which it was granted, was that it might be altered, amended, or repealed, at the pleasure of the General Assembly. That, too, was an element in the contract, by which the defendant agreed in advance to any reasonable alteration which the legislature might lawfully make. The power thus reserved is in terms absolute; yet it is not an unlimited power. Like all other legislative powers it is subject to this important limitation, viz., it shall not be so exercised as to impair the obligation of a contract, or to destroy vested rights.

The acts of the corporation, in accepting the amendment to the charter, and in permitting the city to subscribe for the stock upon the terms contained in the amendment, deprived the defendants of the privilege of voting for two of the directors. The defendants say that the destruction of this right absolved them from all obligation to pay for their stock. Whether it does or not is the question we are now to consider.

Some amendments, or laws, affecting corporations, are binding with or without their assent. Others bind the corporation and every member thereof, if assented to by a majority of the stockholders. And others are not binding upon non-consenting members, although assented to by the majority. All general laws, and mere matters of police regulation, are embraced in the first class. Additional powers, duties, and privileges, which do not change essentially the nature and character of the corporation, or the purpose for which it was created, and have for their object the promotion of the enterprise originally contemplated, fall within the second class. All amendments which work a radical change in the nature and character of a

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corporation, or the purpose for which it was created, are within the third class.

It is not easy to establish a general rule by which it may be seen at a glance to which class any given case belongs. Each case must in a measure depend upon its own circumstances. A careful examination of the case before us, and the authorities bearing upon the question, has led us to the conclusion that it belongs to the second class, and that the amendment is binding upon every member of the corporation.

There is no change in the character of the corporation. It is a railroad company still, relating to an important public improvement. The object of its creation, the construction and operation of a railway from New Haven to Derby, remains precisely the same. There is some change in the mode of appointing the board of directors; but that change is not a radical one, nor is it, under the circumstances, an unreasonable one. So far from working an injury to the defendants, it is, as we have already seen, a benefit to them. The directors are elected by the stockholders, and every one has a voice in the election. No one has an undue advantage over the others, and the rights of all are carefully guarded. The object of the amendment was not to obstruct, hinder, or change, but to facilitate, the enterprise in which all were engaged; and, so far as we can see, it has had the designed effect. It is not an attempt on the part of the legislature to control the organization, or to place it in the power of one or more of the stockholders to elect all, or a majority, of the directors; but, on the contrary, the design was to prevent that result. The matter of voting and the mode of electing officers, are usually provided for in the charter. The legislature may, in the first instance certainly, impose such terms and restrictions as may be thought best. The powers reserved will authorize subsequent legislation upon the same subject,

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so long as the owners of the stock retain the control of the corporation, and are all placed upon equal and fair terms.

The rights, therefore, of which these defendants have been deprived, are rights which they held subject to such reasonable changes and regulations as the legislature might make, with the assent of the corporation; and they are not thereby absolved from their obligation to pay for their stock.

The decided cases on this subject will abundantly sustain our position. A few only of the many cases cited will be referred to. And first two or three of the strongest cases relied upon by the defendants.

Hartford, &c. R. R. Co. v. Croswell, 5 *Hill* (N. Y.) 383. That was an action against a subscriber to recover certain installments upon his stock. After the installments became due, the charter was altered, by authorizing the company, in addition to the powers originally granted, to purchase certain steamboats to be used in connection with its road, not exceeding in amount the sum of two hundred thousand dollars. It was held that neither the board of directors, nor a majority of the stockholders, could sanction the alteration so as to bind the defendant without his consent. In that case there was a diversion of the funds from the purpose originally contemplated. Here there is no such diversion. But even the authority of that case is considerably shaken by later cases cited below.

Troy, &c. R. R. Co. v. Kerr, 17 *Barb.* (N. Y.) 581. The company was incorporated with a capital of one million five hundred thousand dollars. After the defendant subscribed to the stock, the articles of association were amended under a general law, by which the capital was reduced to three hundred and twenty-five thousand dollars, and the contemplated road was materially shortened. The defendant refused payment of calls upon his stock, and, in an action brought to

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recover them, it was held that the plaintiffs were entitled to recover. There were other questions in the case. The presiding judge, who gave the opinion of the court, doubted upon this point, but seems to have acquiesced in the decision, partly upon the ground that there was evidence tending to show that the defendant assented to the charge. But a majority of the court were of the opinion that there was no such radical change of the plan and business of the corporation, as exonerated the defendant. The presiding judge in the course of his opinion says: "Admitting that an alteration may discharge the obligation, was not this one incidental to the undertaking, and to which the stockholder must be considered impliedly to assent? and if not, was it so material as to be a ground of defense?" That case is in reality an authority against the defendants. The court seems to have gone further than we are required to go in the present case, as the alteration in that case was much more radical than in this.

Sage v. Dillard, 15 *B. Monr. (Ky.)* 340. The corporation in that case was established purely for charitable purposes, and depended for its funds mainly upon voluntary contributions. The legislature from time to time authorized an increase in the number of corporators, and finally increased them arbitrarily, by appointing sixteen new corporators by name. The corporation refused to accept the amendment. The court held that the act of the legislature was inoperative. That case differs from this in two important particulars. First, in that case the amendment was rejected by the corporation; in this it was accepted. Secondly, that was an attempt by the legislature to have a voice in the management of funds contributed for charitable purposes, against the will of the persons to whom their management had been intrusted by the donors, and, presumptively, perhaps, against the will of the donors themselves. They had vested in the old

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corporators the control of these funds. The action of the legislature was a manifest infringement of that right. Nothing of that kind appears in this case.

We have no occasion, at this time, to enter upon the discussion of the difference between an eleemosynary corporation, and a corporation for the prosecution of an enterprise involving public interests. It certainly seems reasonable that the power of the legislature to legislate in respect to the latter, should be more extensive than in respect to the former. The case of *Ffooks v. London, &c. R. Co.*, 19 *Eng. L. & Eq.* 7, maintains this proposition: "The rule that the majority can not bind the minority in a joint stock company, as to acts not contemplated by the common contract, has not been applied to corporate companies for a public undertaking, involving public interests and duties, under the sanction of parliament." Whether we should go so far, if the question was directly before us, we need not now say. We quote the case as showing that we are not going beyond the limits of the law elsewhere.

In the case of *Buffalo, &c. R. R. Co. v. Dudley*, 14 *N. Y.* 336, it was expressly held that "An alteration by the legislature of the company's charter, in pursuance of powers reserved, by changing its name, increasing its capital, and extending its road, does not discharge the defendant from liability on his subscription; and this, whether such alteration is beneficial to the defendant or not, the alteration having been duly made, and without any fraud on the part of the company." See, also, *Schenectady, &c. Plank Road Co. v. Thatcher*, 11 *N. Y.* 102.

SEYMOUR, J., did not sit.

Others concurred.

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MILLER v. THE STATE OF NEW YORK.

15 Wallace, 478.

*Supreme Court of the United States ; December Term,
1872.*

Incorporation. Alteration of charter. The power to alter, modify, or repeal an act of incorporation may be reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of such acts, as well as by an express reservation in any particular charter; and the reserved power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation.

A section of a state constitution provided that "corporations may be formed under general laws, but shall not be created by special act," except in certain cases; and that "all general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." A statute, passed at a later date, enacted that "the charter of every corporation that shall be hereafter granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." While these provisions were in force, a general railroad law was passed, authorizing the formation of railway companies with thirteen directors. A railway company having been formed under this general law, the legislature authorized a subscription to the stock of the company by a certain city, and enacted that the city should appoint four of the thirteen directors. *Held*, that this did not constitute a contract which was violated by a subsequent statute allowing the city to elect seven of the thirteen directors, such a change in the representation of the city having become necessary to preserve the ratio that existed among the subscribers for the stock at the time when the original subscription was made. Nor could the stockholders other than the city claim that the right to elect all the stockholders except four had become vested in them, in such a manner that it was impaired by the statute referred to.

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Error from the supreme court of the United States to the court of appeals of New York.

This was an action in the nature of a *quo warranto* by the attorney general of the state of New York, on the relation of Powers and six others, claiming to be directors of the Rochester & Genesee Valley Railroad Company, against Miller and eight others, claiming to be directors of the same company, elected under a different authority. The facts of the case are fully stated in the opinion. The supreme court of the state of New York, in which the action was brought, rendered judgment for the plaintiffs. From this judgment the defendants appealed to the court of appeals of New York, which affirmed the judgment. To review the latter decision, the defendants sued out a writ of error from the supreme court of the United States.

Theodore Bacon and *H. R. Selden*, for the plaintiffs in error.

J. C. Cochrane, for the defendants in error.

CLIFFORD, J.—Corporate franchises, granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant under such circumstances, if it be absolute in its terms, and without any condition or reservation importing a different intent, becomes a contract within the protection of that clause of the Constitution which ordains that no state shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the state and the corporators, and the rule is well settled that the legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, can not repeal, impair, or

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alter such a charter, against the consent or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power can not be regarded as an act within the prohibition of the constitution. *Pennsylvania College Cases*, 13 *Wall.* 213. Such power also, that is the power to alter, modify, or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be; in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. *Fletcher v. Peck*, 6 *Cranch*, 136; *Terret v. Taylor*, 9 *Id.* 51.

Matters of fact, though not in dispute, must be first ascertained, in order that the questions involved in the case may be properly presented for decision. Briefly stated, the material facts are as follows, as appears by the finding of the court of original jurisdiction, and from the concessions of the parties:

That the railroad company is a corporation duly organized under the general railroad act of the state, passed on April 2, 1850, and that the articles of association were, on July 10, of the succeeding year, filed in the office of the secretary of state; that the articles of association provided for the construction of a railroad from Rochester to Portage, a distance of fifty miles, with a capital of eight hundred thousand dollars, to be

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divided into shares each for one hundred dollars, as therein specified; that the stock subscribed for the corporation, paid and unpaid, amounted to nine thousand seven hundred and seventy-five shares, of which only five thousand five hundred and fifty-two shares were ever fully paid, and for which certificates have been issued. Authority was conferred upon the city of Rochester, by an act to amend the charter of the city, to subscribe for or purchase stock of that railroad company to the amount of three hundred thousand dollars, and the provision was that by virtue of that subscription or purchase the city should acquire all the rights and privileges, and be liable to the same responsibilities as other stockholders of said company, except in certain particulars not necessary to be mentioned. *N. Y. Sess. Acts 1851*, p. 768. Pursuant to that authority the proper officers of the city subscribed for that amount of the stock of the railroad company, and it appears that the proper officers of the railroad company elected to receive the subscription, and that the full amount of the subscription was paid, and that the certificates of the shares were duly issued to the city, and that the city has ever since been the holder and owner of the whole number of said shares. Power was also conferred upon the city, in case the company "elected to receive their subscription," to nominate and appoint one director for every seventy-five thousand dollars of capital stock held by the municipality, at the time of each election of directors, but the further provision was that the city should have no voice in the election of the remaining directors; consequently the common council of the city, at the time of each annual election of directors, elected four—the number being limited by law to thirteen—and the other stockholders elected nine, without any interference from the city authorities. Complaints arose from the fact that four hundred and fifty-two thousand

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three hundred dollars of the stock, subscribed by parties other than the city, had never been paid in, nor had certificates ever been issued for any part of that unpaid subscription. On the contrary, the same was not in existence as stock, having long before been extinguished and forfeited for non-payment, in consequence of which the railroad company had abandoned the construction of their road south of Avon, and assigned all their right of way, property, and franchises beyond that point to another corporation, so that their railroad as constructed and operated terminates at Avon, and is only eighteen and three-fourth miles in length. Control of the railroad, by a change of circumstances not contemplated when the plan was organized, being in the hands of stockholders owning a minority of the stock, the legislature of the state, on March 9, 1861, enacted that the common council of the city should "have the power to nominate and appoint one director of the company for every forty-two thousand eight hundred and fifty-five dollars and five-sevenths of a dollar of capital stock of the said railroad company held by the said city, at the time of each election of directors of said company." *N. Y. Sess. Acts* 1867, p. 92. Thereafter the common council of the city, as the plaintiffs claim, became entitled at each annual election of directors to elect seven of the number allowed by law, and that the other stockholders were entitled to elect the remaining six only, as authorized by the apportionment prescribed by the amendatory act of the legislature. Accordingly the common council of the city, at the annual election held in June of the succeeding year, elected seven directors, but the other stockholders, denying the validity of the amendatory act, elected nine directors under the old law, and the persons so chosen immediately entered upon, used, and exercised the said offices as directors of said corporation, and without any warrant or

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authority, as insisted by the plaintiffs. Deprived of their rights as defined by the amendatory act, the plaintiffs brought the present action, in the nature of a writ of *quo warranto*, in the supreme court of the state, alleging that the nine directors elected by the other stockholders have usurped the offices of directors of the railroad company. Service was made and the defendants appeared and filed an answer. Hearing was had, and the supreme court rendered judgment for the plaintiffs, and the defendants transferred the cause to the court of appeals, where the judgment was affirmed; thereupon the losing party sued out a writ of error and removed the record into this court. They seek to reverse the judgment of the state courts upon the ground that the act of the state legislature, authorizing the common council of the city to elect seven of the thirteen directors in the railroad company, is unconstitutional and void as repugnant to their act of incorporation, and in support of that theory they submit the following propositions: (1.) That the signers of the beforementioned articles of association, when the articles were filed in the office of the secretary of state, became a corporation by the name specified in those articles, with all the powers and privileges granted by the general law of the state upon that subject. 3 *Edm. (N. Y.) Stat.* 618, §§ 1-4. (2.) That the powers and privileges thus conferred were granted by the state, and that the grant, as an act of incorporation, became and was an executed contract. (3.) That the powers and privileges of the charter are prescribed and defined in the general railroad law of the state. (4.) That the persons named as corporators in a charter can not be compelled to accept the act of incorporation, nor any modification or extension of the powers and privileges granted, whether conferred or modified or extended, by a special act or by virtue of a general law. (5.) That a contract created by an act of incor-

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poration, when once complete, is unalterable by either party without the consent of the other.

Undoubtedly the powers and privileges of the railroad company in this case are the same as they would have been if the company had been incorporated by a special act, and it may also be conceded that the charter, when the articles of association were filed in the office of the secretary of state, became an executed contract, subject to the restrictions ordained by the constitution of the state, and to the reservations contained in the general law of the state relating to corporations, and also in the general railroad act, which it is admitted prescribes and defines the powers and privileges of the railroad company.

Section 1 of article VIII. of the constitution of the state ordains as follows: "Corporations may be formed under general laws, but shall not be created by special act, except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." *Const. of N. Y.* 1846, art. VIII., § 1.

Provision is also made by section 8 of the act defining the powers, privileges, and liabilities of corporations, that the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature. 1 *N. Y. Rev. Stat.* 600.

Articles of association for the incorporation of railroad companies can not be filed and recorded in the office of the secretary of state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, nor without complying with the other conditions specified in section 2 of the general railroad act; and section 1 of the act provides that such corporation shall be subject to the provisions (except those enacted in section 7) contained in title three of chap-

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ter eighteen of the first part of the Revised Statutes, which includes section 8, containing the reservation that the charter of every corporation that shall hereafter be granted shall be subject to alteration, suspension, and repeal, in the discretion of the legislature. *N. Y. Sess. Acts* 1850, 212, § 1. Such a reservation, therefore, is not only ordained by the constitution of the state, but it has been twice enacted by the legislature, and it is conceded that both of those statutes are in full force. Superadded to those reservations is the further one, contained in section 48 of the general railroad act, which provides that the legislature may, at any time, annul or dissolve any corporation formed under this act, the effect of which, it is admitted by the defendants, is to incorporate into the grant a power of revocation, which seems to supersede all necessity for any further remark upon the subject. *N. Y. Sess. Acts* 1850, 234, § 1.

Much consideration was given to the question under consideration in the case of *Dartmouth College v. Woodward*, 4 *Wheat.* 675, in which the right of the state was denied to amend the charter granted to the college by the crown before the Revolution, and to modify and restrict the same without the consent of the trustees under the charter. Four propositions were decided in that case, the opinion being given by the chief justice: (1.) That the charter was a contract within the meaning of that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts. (2.) That the charter was not dissolved by the Revolution. (3.) That the acts of the state legislature altering the charter, in a material respect, without the consent of the corporation, was an act impairing the obligation of the charter, and was unconstitutional and void. (4.) That the college, under its charter, was a private and not a public corporation.

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Concurring opinions were also given by two of the associate justices, and STORY, J., in enforcing his views, remarked that where a private corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown can not, in virtue of its prerogative, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or augment or diminish the number of trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporators to receive a new charter.

Prior to that adjudication, the supreme court of Massachusetts had decided that rights legally vested in a corporation can not be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation; and the learned judge having referred to that case remarked that the principles there laid down are so consonant with justice, sound policy, and legal reasoning, that it is difficult to resist the impression of their perfect correctness, showing very plainly that such legislation would be valid if the power for that purpose is reserved in the act incorporating the company. *Dartmouth College v. Woodward*, 4 *Wheat.* 708; *Wales v. Stetson*, 2 *Mass.* 146. Conclusive evidence that such was the opinion of that learned judge is also derived from his subsequent remarks in that same case, in which he says that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, *without its assent*, is a violation of the obligations of the charter, adding, "If the legislature mean to claim such an authority it must be reserved in the

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grant." *Dartmouth College v. Woodward*, 4 *Wheat.* 712; *Cooley Const. Lim.* 279.

Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power can not be regarded as an act within the prohibition of the constitution. *Pennsylvania College Cases*, 13 *Wall.* 213.

Members of banking associations, it was enacted by the general banking law of New York, should not be individually liable for the debts of the association, unless it was so provided in the articles of organization, but this court held, in the case of *Shearman v. Smith*, 1 *Black*, 587, that a subsequent statute imposing such a liability upon the shareholders of the association was a valid law, as the charter reserved to the legislature the power to alter or repeal the act of incorporation. Such a conclusion was earnestly resisted at the bar, as the conditional exemption from such liability was embodied in the articles of association, but the court overruled the defense upon the ground that the reservation in the charter of the right to alter or repeal the act was paramount and controlling.

Decisions of the state courts, in repeated instances, both before and since that time, have been made to the same effect. When that case was before the court of appeals, before the record was removed here for revision, the court of appeals decided that the provision reserving to the legislature the power to alter or repeal the general banking law became a part of the contract with every association formed under it, and that the state might modify it prospectively or retrospectively, without infringing the article of the federal constitution, which ordains that no state shall pass any law impairing the obligation of contracts, and this court affirmed the judgment in that case. *Lee's Bank*, 19 *N. Y.* 146.

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Laws could not be enacted under the constitution in force when the general banking law was passed, to create, alter, continue, or renew any body politic or corporate, without the assent of two-thirds of the members in each branch of the legislature. Consequently it was contended that the members of such associations, subsequently created, could not be affected by the statute declaring that shareholders should be liable individually for the debts of the association, but the court of appeals reaffirmed the decision in the preceding case, and determined that the statute imposing that liability was a valid exercise of the power reserved in that act, and that its effect was that the franchises and privileges granted were at all times subject to abrogation or change by the legislative power of the state; that the power reserved was one to be exercised at any time by the existing legislative authority, however constituted, and in any mode conforming to the organic law of the state for the time being. The Reciprocity Bank, 22 *N. Y.* 14; *White v. Railroad Co.*, 14 *Barb. (N. Y.)* 559.

Exactly the same principle was adopted in the case of *Railroad v. Dudley*, 14 *N. Y.* 348, where it was held that an alteration of the charter of the company, made by the legislature, in pursuance of the power reserved to alter or repeal the act, by changing its name, increasing its capital, *and extending its road*, did not discharge a subscriber to the stock from liability for his subscription, whether such alteration was or was not beneficial to him, the alteration having been duly made and without fraud on the part of the company. See also *Plankroad v. Thatcher*, 11 *N. Y.* 110.

Under such a reservation it is also held by the same court, that a member of the corporation holds his stock subject to such liability as may attach to him in consequence of an extension or renewal of the charter, made without his application or consent, and that the

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estate of an intestate succeeds to the individual liability imposed on the owner in his lifetime as a stockholder, in a corporation whose charter would have expired if it had not been renewed, but was extended after his death; and that his administrator was liable for debts of the corporation contracted after the death of the intestate. *Bailey v. Hollister*, 26 *N. Y.* 116; *Clarke v. Rochester*, 28 *Id.* 631; *People v. Hills*, 35 *Id.* 449.

Even the defendants admit that the exact question presented for decision in this case was decided by the supreme court of the state in the case between these same parties, or some of them, and which was subsequently transferred to the court of appeals, and was there reversed upon an exception involving a question of local law. *People v. Hills*, 46 *Barb. (N. Y.)* 344.

Nearly forty years earlier the same question substantially was decided in the same way by the chancellor of that state, in which he held that where a state legislature reserves to itself, in the very charter it grants to a private corporation, the right of altering, amending, or repealing the act of incorporation, a subsequent repeal of the charter is valid and constitutional; that such a reservation in the charter of a corporation, upon common-law principles, is not repugnant to the grant, but a constitutional limitation of the powers granted. *McLaren v. Pennington*, 1 *Paige (N. Y.)* 102. Few or none, it is presumed, will question the correctness of that rule, but the court here is of the opinion that the reservation is equally valid and effectual if it exists in the constitution of the state, or in a prior general law. *Pennsylvania College Cases*, 13 *Wall.* 213; *General Hospital v. Insurance Co.*, 4 *Gray (Mass.)* 227; *Roxbury v. Railroad Co.*, 6 *Cush. (Mass.)* 424; *Suydam v. Moore*, 8 *Barb. (N. Y.)* 363; *Ang. & A. on Corp.* 9th ed. § 767. So where the legislature, in granting a charter to an insurance com-

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pany, reserved the right to alter it, and they subsequently exercised that right by declaring that if the assets of such corporation should pass into the hands of a receiver, he might make assessments upon the premium notes, it was held that this was a legitimate exercise of the reserved power, and that it fully authorized the receiver to make assessments whenever it became necessary to carry the intention of the legislature into effect. *Hyatt v. McMahon*, 25 *Barb.* (N. Y.) 467. Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it can not be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. *Commonwealth v. Essex Co.*, 13 *Gray* (Mass.) 253; *Miller v. Railroad Co.*, 21 *Barb.* (N. Y.) 517. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the funds of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract. *State v. Adams*, 44 *Mo.* 570; *Zabriskie v. Railroad Co.*, 18 *N. J. Eq.* 180; *Railroad Co. v. Veazie*, 39 *Me.* 581; *Sage v. Dillard*, 15 *B. Monr.* (Ky.) 357.

Attempt is made in this case to show that the right to elect all of the directors except four had become vested in the stockholders owning a minority of the

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shares, and that the amendatory act giving to the city the power to elect seven impairs that vested right, but the court is entirely of a different opinion, as the legislature, in conceding that right, made the concession subject to the reserved power to alter or repeal the charter, as ordained in the constitution of the state, and also in the several statutes mentioned, which clearly give to the legislature the power to augment or diminish the number, or to change the apportionment as the ends of justice, or the best interest of all concerned may require.

All parties supposed, when the charter was formed, and when the subscriptions to the stock were paid, that the capital stock would be eight hundred thousand dollars, and that the right conceded to the city to elect four out of the thirteen directors would give the city a fair proportion of the whole number, but circumstances have changed in consequence of the failure of a large class of the subscribers to the stock to make good their subscriptions. Payments being refused, the corporation found it necessary to reduce the capital stock, and to shorten the route, as before explained.

These changes from the original design made new legislation necessary to the ends of justice, and the amendatory act was passed to effect that object, and the court is of the opinion that the amendatory act is a valid law, and that the judgment should be affirmed.

BRADLEY and FIELD, JJ., dissented.

Others concurred.

Judgment affirmed.

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16 Wallace, 390.

*Supreme Court of the United States ; December Term,
1872.*

Incorporation. Subscriptions. The laws of a state required that all railroad companies, before being organized, should have a subscription to their stock of not less than fifty thousand dollars. Certain persons did subscribe more than that sum, with a proviso, however, that if a certain city in its corporate capacity subscribed fifty thousand dollars or upwards, the city should accept what each of them had subscribed above three hundred dollars. The city did subscribe much more than fifty thousand dollars, whereupon the directors of the company, being themselves original subscribers, passed a resolution authorizing the original subscribers to transfer to the city all stock subscribed by them over three hundred dollars each, and that the stock thus transferred be merged in the subscription made by the city; which was done, and thereupon three hundred dollars was paid by each subscriber, and accepted by the company, in full satisfaction. The company having become insolvent, its creditors filed a bill to compel the payment of the excess over three hundred dollars of each of such original subscriptions, and the application of such payments to their judgments. *Held*, that the original subscribers were not liable. The conditions in their subscriptions allowing the transfer to the city could not be held invalid, as such transfer did not lessen the capital of the company, nor deprive the state, the creditors, or other stockholders of any security or protection. And the fact that the directors were original subscribers did not affect the case; the transfer having been in accordance with the conditions on which the original subscription was made, and in itself fair.

Appeal to the supreme court of the United States
from the circuit court for the district of Indiana.

This was a suit in equity, by Burke and others, as
owners of a judgment against the New Albany & San-

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usky Railroad Company, against Smith and others, seeking to subject to the payment of the judgment, rights which, it was alleged, that company had against the defendants.

The judgment was recovered in 1857, and an execution thereupon, issued in 1858, was returned "*nulla bona*." More than ten years afterward this suit was brought. The bill alleged the insolvency of the company, and that the defendants had subscribed to its capital stock, severally, amounts which they had never paid; and sought to compel the payment of these subscriptions, and the application of the payments to the satisfaction of the complainants' judgment. The facts were as follows:

On August 22, 1853, under the general railroad laws of the state of Indiana, the defendants, with others, united in forming articles of association for the incorporation of the New Albany & Sandusky Railroad Company, and severally subscribed to its capital stock in sums varying from one thousand dollars to five thousand dollars. The railroad laws of the state allowed no railroad company to be organized until at least fifty thousand dollars, or one thousand dollars for every mile of the proposed road, should have been subscribed. The articles of association contained the following stipulation:

"*Provided*, however, and it is hereby understood, that if the city of New Albany, in its corporate capacity, shall hereafter take stock in this corporation to the amount of fifty thousand dollars or upwards, inasmuch as the present subscribers, being residents of and owning property in said city, will then be under the necessity of contributing still further to the corporation by way of taxation, unless a portion of the present subscription is taken off their hands, the said city shall accept, in part of the amount to be subscribed in its corporate capacity, at its par value, a transfer of

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any amount of stock now subscribed for by each individual over and above the amount of six shares, or three hundred dollars, which each such individual may desire or request shall be so transferred."

There were fifty-five original subscribers, and the aggregate amount of the subscriptions was one hundred and forty-eight thousand seven hundred and fifty dollars. With such a subscription, and under such articles of association, the subscribers became a corporate body. After their incorporation, the city of New Albany subscribed four hundred thousand dollars to the capital stock of the company. This subscription was made on November 19, 1853, and on December 31, next following, the directors of the company adopted the following order :

"That the original subscribers to the articles of association be permitted, in accordance with the stipulations contained in the articles, to transfer any amount of the stock so originally subscribed by them over and above the amount of six shares, or three hundred dollars, to the city of New Albany ; said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards, and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said city, under her present subscription, with the stock so transferred, shall not exceed four hundred thousand dollars, as subscribed by her."

The directors of the company, who made this order, were themselves subscribers, like the defendants, for more than six shares, or sums above three hundred dollars.

As to these facts there was no controversy. There was also an "agreement of record," certified by the clerk of the court below, with the bill, answers, depositions, &c., as part of the full, *true*, and complete copy and transcript of the record and proceedings in

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the case—that the defendants transferred to the city of New Albany all the stock subscribed by them in excess of three hundred dollars for each, in compliance with the stipulation contained in the original articles of association; that the transfers were made before July 1, 1854; that none of these original subscribers were ever charged on the books of the railroad company with any greater amount of stock than three hundred dollars; that the amount of stock charged against each (viz., three hundred dollars) had been fully paid long before the filing of this bill, and when called by the company, and that such payments had been accepted by the company as full satisfaction of the respective subscriptions.

The court below, holding that the defendants were not debtors to the railroad company for any excess of their subscriptions above three hundred dollars, dismissed the bill against them.

From this decree the complainants appealed.

Burke, Porter, & Harrison, for the appellants.

M. C. Kerr, for the appellees.

STRONG, J.—The question to be solved is whether the appellees are debtors to the railroad company for the excess of the subscriptions over three hundred dollars, made by them to the articles of association. If they are, the complainants have an equitable right to subject those debts to the payment of the judgment they have against the railroad company. And it must also be conceded that if the company has, in fraud of its creditors, released subscribers to its stock from the payment of their subscriptions, the release is inoperative to protect those subscribers against claims of the creditors. Under the law of the state, all railroad companies are required to have a subscription to their

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capital stock not less than one thousand dollars for every mile of their proposed roads before they may exercise corporate powers. This requirement is intended as a protection to the public, and to the creditors of the companies. And it is clear that the directors of a company, organized under the law, have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company, its means for performing its duty to the commonwealth, and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company.

It is upon these principles that the appellants in this case rely, and the question is whether they are applicable to the facts as found.

That the subscriptions made by the appellees to the articles of association for the incorporation of the company were, according to their terms, not absolute engagements to pay for a greater amount of stock than three hundred dollars for each subscriber, is undeniable. They were engagements to pay for the number of shares subscribed, only on the contingency that the city of New Albany should not afterwards take stock in the corporation to the amount of fifty thousand dollars or upwards, or, if such stock should be taken, on the contingency that they failed to transfer a part of their subscriptions to the city. Such was the letter and the spirit of the contract entered into by

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each subscriber. Whether the law permitted it to have such a legal effect we will presently consider. But that such was its meaning, independently of any rule of legal policy, is very plain. It is the very language of the articles of association. When, therefore, the directors of the company, on December 31, 1853, ordered that the original subscribers to the articles, in accordance with the stipulation contained therein, be permitted to transfer any amount of the stock (exceeding six shares) subscribed by them to the city of New Albany (that city having made a subscription exceeding fifty thousand dollars), and ordered that the stock thus transferred be merged in the stock subscribed by the city, the order was no more than allowing the contract to be performed as made. It was no release of any rights which the company had; no abandonment of any resources of the corporation. It was no more than the subscribers, in view of the provisions of their contract, had a right to demand. Unless the contract must be held to have been an absolute undertaking, that each subscriber would himself pay for all the stock subscribed by him, it was fully performed by the payment of three hundred dollars and the transfer of the excess to the city to be merged in its larger subscription.

It must, however, be conceded that conditions attached to subscriptions for the stock of a railroad company made before its incorporation have, in many cases, been held to be void, and the subscriptions have been treated as absolute. The question respecting their validity has most frequently arisen when the condition has been that the proposed road should be located in a specified manner, or over a defined line. But other conditions have been held invalid, and have been disregarded by the courts. The reasons for such a ruling are obvious, and they commend themselves to universal approval. When a company is incorporated

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under general laws, as the New Albany & Sandusky Railroad Company was, and the law prescribes that a certain amount of stock shall be subscribed before corporate powers shall be exercised, if subscriptions, obtained before the organization was affected, may be subsequently rendered unavailable by conditions attached to them, the substantial requirements of the laws are defeated. The purpose of such a requisition is, that the state may be assured of the successful prosecution of the work, and that creditors of the company may have, to the extent at least of the required subscription, the means of obtaining satisfaction of their claims. The grant of the franchise is, therefore, made dependent upon securing a specified amount of capital. If the subscriptions to the stock can be clogged with such conditions as to render it impossible to collect the fund which the state required to be provided before it would assent to the grant of corporate powers, a charter might be obtained without any available capital. Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the state of the security it exacted that the railroad would be built, and diminishing the means intended for the protection of creditors, are therefore a fraud upon the grantor of the franchise, and upon those who may become creditors of the corporation. They are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect.

But the reasons of the rule are totally inapplicable to the present case. The appellees are not asking to diminish the capital of the company by force of any condition attached to their subscriptions. The action

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of the board of directors permitting a transfer to the city of New Albany of all the stock originally subscribed, in excess of six shares by each subscriber, according to the stipulations of the articles of association, was not a release of any stock subscription, nor was it an attempt to lessen the means of the company to build its road and pay its creditors. We can not, while recognizing the rule as a sound one, overlook the peculiar facts of this case. Under the articles of association the original subscribers undertook, not that they would respectively pay, at all events, for all the shares mentioned in their several subscriptions, but, in substance and effect, that such a number of shares should be paid for, either by themselves or by the city of New Albany, if it became a subscriber. There was no condition by which the number of shares subscribed and made available could ever be reduced. Had the city taken no stock they would have been liable for all the shares taken by them. It is impossible to see in this any fraud upon the state or upon the creditors of the company. They have all the security in those subscriptions which they would have had there been no right to transfer to the city reserved. The capital stock is all that it was represented to be when the company became incorporated. The only change is, that a part of it is pledged by the city of New Albany, instead of by these appellees. No capital has been lost by the transfer.

If, then, the reason of the rule invoked by the appellants has no applicability to the facts of this case, the rule itself fails, there is no condition to be stricken from the subscription, and there is no ground for holding the appellees liable beyond the plain letter and spirit of their contract.

It is insisted, however, on behalf of the appellants that there never was any transfer by these appellees to the city of the excess above six shares for each, of the

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stock mentioned in their subscriptions, and it is denied that we can consider the admission of such a transfer, which appears in the record, as any proof of its having been made. It is said that the alleged admission is an unauthorized certificate of the clerk, which constitutes no part of the record, and we are referred to *Fisher v. Cockerell*, 5 *Pet.* 248. But that case does not support the appellants. It was an action at common law, in which it was said "in cases at common law, the course of the court has been uniform, not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. . . . The unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, can not make that document or that evidence a part of the record, so as to bring it to the cognizance of this court."

All the other cases cited were suits at law, in which, of course, the evidence could not come upon the record except in the regular manner. A clerk's certificate could not bring it there. But this is a bill in equity. In such a case no bill of exceptions is necessary to bring upon the record the proofs and admissions of the parties. There is the same reason for regarding the admission which appears in this record a part of the record, as there is for considering any one of the depositions. It would be very extraordinary, if parties to a proceeding in equity may not, at the hearing, make an admission of facts, upon which the inferior court may act, and which may be considered on appeal to this court. And it would be still more extraordinary, if appellants, under whose direction a record in chancery has been made up, and who have filed it here without objection, should be permitted to assert for the first time on the argument, that the clerk had certified improperly as a part of the record, an admission at the hearing below, which was never made, or which, if

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made, we are not at liberty to regard. It is not denied that the admission of record, certified by the clerk, was agreed to by the parties, that it was reduced to writing, and entered upon the record, nor is it denied that it was considered by the court below as evidence in the cause, and considered without objection. We must, therefore, hold that it is to be treated as part of the record now, and if so, it establishes fully the transfer of the stock to the city before July 1, 1854; that none of the appellees were ever charged with it on the books of the company, and that the transfer was made with the assent of the corporation, constituting, with the payment made for the six shares not transferred, full satisfaction of the indebtedness of the appellees, and accepted as such. It is true there appears to have been no written transfer. None was necessary. The appellees had received no certificates. They were not on the books as stockholders for more than six shares each, and from the beginning it was understood and agreed that for all liability beyond that, the city, if it subscribed, was to step into their place.

It is next denied that the city accepted the transfer. To this it may be answered that the acceptance is implied in the admission of record. There could have been no transfer without the assent of both parties. More than this. The other evidence tends strongly to show that the mayor and some members of the councils of the city knew of the transfers and assented to them, and the city never dissented from the arrangement.

It is true that a mere assignment of his share by a subscriber does not relieve him from liability until the assignee is substituted in his place. But here the substitution was recognized by the company. The stock was not charged to the appellees on the books, and after the lapse of nine years it is too late to affirm that the transfer was not accepted.

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Again, it is argued that the directors of the company were personally interested as original subscribers, and therefore that their order of December 31, 1853, permitting the transfer, was illegal. But if, as we have endeavored to show, the original subscriptions were valid as made, if the stipulation in the articles of association was not prohibited by the law, it needed no such order of the board of directors to validate the substitution of the city for the original subscribers. It matters not then that the directors were interested. Equity would have enjoined them against interference to prevent a transfer, with all its stipulated consequences. The substitution of the city was a matter over which they had no discretionary power.

There is, then, we think, nothing, either in law or in the facts, that can justify our holding that the appellees were indebted to the company on their subscriptions when this bill was filed ; nothing to impeach the validity of the arrangement provided for in the articles of association, and carried out afterwards with the assent of the company, by which they were discharged from all liability.

This is sufficient for the case, and if it were not it would be a grave inquiry, whether the laches of the appellants has not been such that they can not now invoke equitable relief. Their judgment was recovered in 1857, and the return of *nulla bona* to their execution was made in December, 1858. Before that time the company had become insolvent, and some five years before that time the arrangement had been consummated which they now assail as a fraud upon the creditors. It is incredible that they did not know of the arrangement. The articles of association were on record open to their inspection. Those articles exhibited in prospect precisely what was done. No one could have seen them without having it suggested that the original subscribers had not at first

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intended to pay for all the stock mentioned in their subscription, and that it was intended the city should take part of the stock off their hands. The company's books, which they might have seen, would have told them the appellees had paid for only six shares. This was quite sufficient to make inquiry a duty. And had inquiry been made there was not the least difficulty in ascertaining the facts. Yet the present suit was delayed until 1868. True, the appellants' bill alleges the indebtedness of the appellees by force of their contracts. It does not charge a fraud. But it is plain that unless the arrangement by which the subscriptions were merged in that of the city was a fraud upon them their bill must fail. The court must set aside that arrangement or they can not recover. And the burden is upon them to establish the fraud. Had their bill been framed to set aside the arrangement because of fraud, it must have been held to have been filed too late. The statute of limitations bars actions for fraud in Indiana after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him.

But we pursue this branch of the case no further. We have already said enough to show that, in our opinion, there was no error in the decree of the court below.

Decree affirmed.

THE PEOPLE OF THE STATE OF CALIFORNIA
ex rel. PLUMAS COUNTY v. CHAMBERS.

42 California, 201.

Supreme Court of California ; October Term, 1871.

Incorporation. Subscriptions. Under a statute providing for the incorporation of railway companies,—which requires at least one thousand dollars stock to be subscribed for each mile of the proposed railroad, and ten per cent. thereof, in cash, to be actually and in good faith paid in before incorporation (*Cal. Stat.* 1861, 607),—such requirements are not merely directory, but are conditions precedent, the performance of which is essential to the validity of the act of incorporation.

A payment of the ten per cent. required, in a check upon a bank, drawn by a person who has not on deposit in such bank funds sufficient to meet the check, is not a payment in cash, as required by the statute, even though such check would have been paid by the bank if presented; and an incorporation founded on such payment is invalid, and will be so declared on *quo warranto*.

Appeal to the supreme court of California from the district court of the second judicial district, Plumas county.

This was an action of *quo warranto*, brought on the relation of Plumas County against Chambers and others, claiming to compose the Oroville & Virginia City Railroad Company, on the ground that the defendants were usurping the functions of a railroad company. The facts are stated in the opinion. Upon trial, judgment was rendered for the defendants. A motion by the plaintiff for a new trial was denied. From the judgment and the order denying his motion for a new trial, the plaintiff appealed.

State of California *ex rel.* Plumas Co. v. Chambers.

Van Clief & Geer, for the appellant.

Haymond & Stratton, for the respondents.

CROCKETT, J.—This is an action of *quo warranto* against the defendants, claiming to compose the Oroville & Virginia City Railroad Company, in which the defendants are charged with usurping the functions of a railroad company, without having been duly and properly incorporated as such. The answer sets up the several acts which were performed by the corporators to effect an organization under the general corporation act of this state, and avers that the statute was complied with, and the company duly organized. Judgment was entered for the defendants, and the plaintiff appeals, both from the judgment and from the order denying a motion for new trial.

Written findings were filed, which were excepted to by the plaintiff as defective; but the exceptions were overruled, to which ruling the plaintiff excepted. This ruling is assigned as error on the appeal from the judgment; and it is further claimed that the judgment is inconsistent with the findings as they were made. The last point will be first considered.

The findings are certainly obnoxious to the objection (so repeatedly adverted to by this court) that the findings of fact and conclusions of law are not separately and distinctly stated. Nevertheless, the facts intended to be found can be sufficiently eviscerated from the mere argument and inferences of the court to render it apparent what facts were considered proved. Among other facts the court finds that before the certificate of incorporation was signed, ten per cent. of the amount previously subscribed "was paid in in cash and bankable checks." In a subsequent portion of the findings the particular manner in which this payment was made is thus explained: "The sum of

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ten thousand nine hundred dollars was paid by Bolinger for himself and Chambers (being the ten per cent. upon the stock subscribed by them), by check drawn upon the Bank of California. The good faith of Chambers is shown by the evidence that in a short time after gold bullion was paid by him to Bolinger for his moiety of that check. The evidence of Bolinger shows that he had, prior to March 27, 1867, a large bank account with the Bank of California; that oftentimes he overdraw his account, under arrangements with the bank, the bank charging him a certain interest on the overdrawn day's balance. Other witnesses testified that his checks upon the Bank of California had been taken by them as cash, and cash paid for them, and had never been dishonored. Bolinger says he could not now tell what the status of his account was at the bank, at the time he drew this check; whether the balance then was two thousand dollars or three thousand dollars for him or against; but says absolutely and positively that the check would have been cashed on presentation. That it never was presented amounts to nothing. It, as all other checks drawn upon responsible parties in good faith and with money in the hands of the drawee to meet them, was only a representative of that much money, was paid by the subscribers and received by the company as money, was used by the company as cash assets, and the company could have received the money upon it any time it had been demanded. It was, then, an actual payment of money, and in good faith."

It further appears from the findings, that ten per cent. of the whole amount subscribed, amounted to the sum of eleven thousand dollars, of which ten thousand nine hundred dollars was paid in the above named check. It is obvious that the court intended to find as facts:

First. That the check would have been paid on

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presentation, whether Bolinger had funds on deposit to meet it or not.

Second. That the company received it as cash, but never presented it for payment.

Third. That when the check was drawn, Bolinger had not to his credit in bank sufficient funds to meet it.

Fourth. That the check was paid to and received by the company in good faith as cash.

Assuming these to have been the facts, the question for consideration is, whether the delivery of the check was a compliance with section 1 of the act of May 20, 1861, providing for the incorporation of railroad companies. *Cal. Stat.* 1861, 607.

That section requires, as a preliminary to the organization of the company, that stock to the amount of at least one thousand dollars per mile of the proposed road shall be subscribed, "and ten per cent. in cash so required to be subscribed shall be actually and in good faith paid to a treasurer to be named and appointed by said subscribers from among their number."

We are not called upon, in this case, to decide whether or not a payment of the ten per cent. in good faith, by checks payable *in presenti*, and drawn against a sufficient sum on deposit to meet them, would be a compliance with this requirement of the statute, and particularly if the checks were presented and paid within a reasonable time. That is not this case; and the question here presented is, whether the payment can be made in a check drawn by a person who had not on deposit sufficient funds to meet it, and which was never presented for payment, even though it be conceded that the check would have been paid had it been presented. If payment in this method can be substituted for the cash payment required by the statute, it is obvious that payment in a promissory note, payable on demand, and which would have been paid on presentation, but which was never presented for

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payment, or in any negotiable securities, which might at any time have been converted into cash, but were not so converted, would have been equally as valid as the method here adopted. Nothing was, in fact, paid by Bolinger, unless his personal liability as drawer of the check can be considered payment; for it was not proved, as appears from the findings, that he had any funds to his credit in bank of which the check could operate as an assignment; and it would have been purely at the option of the bank whether it would have paid the check or not. If it had refused, it could not have been coerced to pay it. It was under no legal obligation to pay it, and the case stands precisely as if Bolinger had made his promissory note to the company upon an understanding between him and the bank that, as a matter of favor and accommodation to him, the bank would pay the note on presentation; the note, however, never having been presented for payment.

It is a wholly immaterial circumstance that Bolinger was in good credit, and that his check might, and probably would, have commanded the cash in the vicinity. The same would doubtless have been true of his own or any promissory note by a responsible maker, or a good mortgage security, or marketable stocks, or any other kind of property which had a current market value. But none of them would have constituted a cash payment in the sense of the statute. The policy which dictated this provision is perfectly apparent. It was intended to prevent the formation of corporations for the construction of railroads unless the corporators should testify their good faith and earnestness in the enterprise by subscribing for stock to the amount of one thousand dollars per mile of the proposed road, and actually paying in cash ten per cent. of the amount subscribed before proceeding to incorporate. It was also intended to furnish some

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guaranty to those dealing with the company that it was not a mere paper corporation, without any substantial basis. But whatever may have been the motive for this enactment, its language is clear and explicit, and the courts have no authority to disregard it. I requires ten per cent. of the subscription to be paid in cash; and a check drawn upon a bank by a person who had no funds to his credit, and which was never presented for payment, can in no just sense be deemed cash, however good the credit of the drawer. If the statute had intended to permit the credit of the subscriber to be substituted for cash it would have said so. But it evidently contemplated nothing of the kind. This objection arises on the face of the findings, and in my opinion is fatal to the alleged act of incorporation. The payment of ten per cent. in cash was a condition precedent, without the performance of which the subscribers had no power to incorporate. An exact and literal compliance with the statute in this respect may not be indispensable. If from accident, inadvertence, or some other unintentional cause, there should be a failure to pay an insignificant portion of the ten per cent., I presume it would not vitiate the act of incorporation. But there must be a substantial compliance with the statute. In this case the whole amount to be paid was eleven thousand dollars, of which ten thousand nine hundred dollars was paid in Bolinger's check, leaving only one hundred dollars to be paid in cash. This can not be regarded as a substantial compliance with the statute. Counsel insist, however, that the provision in respect to the prior subscription of stock, and the payment of the ten per cent., is directory only, and that the payment is not a condition precedent, the performance of which is essential to the validity of the act of incorporation, and in support of this proposition we are referred to the case of *Commonwealth v. Westchester R. R. Co.*, 3 *Grant (Pa.)* 200.

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But that decision was founded on a special statute, in many respects essentially different from ours, and does not sustain the position here contended for. But if it was directly in point, we would not be inclined to follow it. On the other hand, I think it is apparent that without a substantial compliance with this provision the subscribers acquired no jurisdiction to organize themselves into a corporate body, and this view of the law is supported by the following authorities: *Eaton v. Aspinwall*, 19 *N. Y.* 119; *People v. Troy House Co.*, 44 *Barb. (N. Y.)* 634; *Haviland v. Chase*, 39 *Id.* 283; *Taggard v. Western Maryland R. R. Co.*, 24 *Md.* 588; *People v. Rensselaer Ins. Co.*, 38 *Barb. (N. Y.)* 323; *Patterson v. Arnold*, 45 *Pa. St.* 415.

If these views be correct, the act of incorporation is invalid, and the defendants are not entitled to exercise corporate powers.

Judgment reversed and cause remanded, with an order to the district court to order judgment for the plaintiff on the findings.

TEMPLE, J., did not sit.

Judgment reversed.

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THE NEW YORK, HOUSATONIC, & NORTHERN
RAILROAD COMPANY v. HUNT.

89 Connecticut, 75.

*Supreme Court of Errors of Connecticut; January
Term, 1872.*

Subscriptions. Evidence. In an action upon a subscription to the stock of a railway company, the production in evidence of the writing declared upon, is not rendered unnecessary by a statute which provides that in any action upon a written instrument claimed to have been executed or entered into by the defendant, and which is described or recited in the declaration, the plaintiff shall not be required to prove the execution or delivery of such instrument, unless the defendant, at the time of pleading, shall file notice in writing that he denies such execution or delivery; even though no such notice has been filed by the defendant.

Incorporation. Subscriptions. The charter of a railroad company provided that no installments of subscriptions to its capital stock, after the first, should be called for until at least five hundred thousand dollars of the capital stock should be subscribed. After such subscriptions to the amount of two hundred thousand dollars had been made, a contractor agreed with the company to construct its road, and to accept in part payment, on the completion of the road, three hundred thousand dollars in its capital stock. The contractor afterward became insolvent, and failed to fulfill his contract. In an action by the company, to recover installments from one of the subscribers to the stock.—*Held*, that such agreement by the contractor was not a subscription to the stock within the meaning of the charter.

Case reserved for the advice of the supreme court of errors of Connecticut, by the superior court of Fairfield County.

This was an action of assumpsit by the New York, Housatonic, & Northern Railroad Company against Hunt, upon the following instrument:

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**"NEW YORK, HOUSATONIC AND NORTHERN RAILROAD
COMPANY.**

"We, the undersigned, hereby agree to take the number of shares set opposite our respective names of the capital stock of the above named company, and to pay for the same in such installments and at such times as a majority of the board of directors of said company shall direct. The said capital stock being one million of dollars, divided into ten thousand shares of one hundred dollars each.

"(Signed) FLOYD K. HUNT. 5 shares."

Upon trial before the court, on the general issue, with notice, the following facts were found :

The defendant not having in his notice denied the execution or delivery of the instrument declared on, the plaintiffs offered no evidence to prove its execution and delivery by the defendant. The plaintiffs proved that the original contract was lost, but they did not offer in evidence a copy, nor attempt to prove the language or substance of it.

The plaintiffs were incorporated under the general railroad law of the state of New York, with a capital stock of one million dollars, in shares of one hundred dollars each, and their articles of association contained the following provision :

"The board of directors may require payment of the remaining ninety dollars on each of the shares already subscribed, and also of the whole or any portion or portions of any additional shares hereafter to be subscribed, at such times respectively as a majority of the board of directors shall prescribe. Provided, however, that no installment shall be payable upon a less notice than ten days ; and that no part of said ninety dollars shall be called for until at least five hundred thousand dollars of said capital stock shall be subscribed."

On October 4, 1865, the plaintiffs entered into a

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written contract with Sidney G. Miller, a contractor, by which Miller agreed to construct a portion of the plaintiffs' road, and to receive in part payment capital stock of the plaintiffs to the amount of three hundred thousand dollars. The plaintiffs offered this contract in evidence, for the purpose of proving that Miller was a subscriber to the stock of the company to the amount of three hundred thousand dollars. At the date of the contract with Miller stock had been subscribed for to the amount of two hundred thousand dollars, which was the amount required by the laws of New York with reference to the length of the road in that state, and was in addition to the amount of stock named in the contract as agreed to be taken by Miller. The contract with Miller was made in good faith by the company and by Miller, and his agreement therein to take the stock named as he should earn it was intended by the parties, and was regarded by them, as a *bona fide* agreement by Miller that he should take such stock when earned by him. Miller, at the time the contract was made, was reputed to be a responsible person, and his pecuniary credit good, and his contract was reasonably believed by the company to be one which could and would be completely and faithfully executed on both sides as agreed, and would be advantageous to the company. Miller from the date of the contract until some time late in the fall of 1866 continued to be in excellent pecuniary credit and standing, when he became embarrassed through the failure of Ketchum & Co., of New York city. Soon after the execution of this contract, to wit: on or before December, 1865, Miller commenced the construction of the road under the contract, and faithfully carried on the construction pursuant to its terms until the fall of 1866, when he took in one Adna Gough as a partner, and afterwards assigned to Gough all his rights in the contract, which assignment was never assented to by the company.

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Gough carried on the work of construction under the contract until March, 1867, when he became entirely insolvent and disappeared, since which time the company have themselves carried on the work of construction, having been compelled so to do by the insolvency and failure to perform of the contractors, but without discharging or releasing them from their obligations; and the portion of the road between Brookfield and Danbury has been completed and running for over two years last passed, and other portions of the road in this state and the state of New York have been and are still being worked. While Miller and Gough were constructing the road under the contract, the company issued to them the stock which they had earned and were to take under it for their work, amounting to about twelve thousand dollars in all. The amount which was issued to Miller individually was about six thousand dollars.

Nine installments of ten dollars each on each share had been called for by the company by the vote of its directors, besides the ten per cent. paid at the time of the subscription of the stockholders, and which the defendant had paid.

The amounts of installments and the date of the calls were as follows:

1st call was made November 14, 1865, and payable December 20, 1865, \$50				
2d	"	March 13, 1866,	"	April 1, 1866, 50
3d	"	May 8, 1866,	"	May 23, 1866, 50
4th	"	May 8, 1866,	"	June 1, 1866, 50
5th	"	June 12, 1866,	"	June 25, 1866, 50
6th	"	Sept. 15, 1866,	"	Sept. 28, 1866, 50
7th	"	Sept. 15, 1866,	"	Oct. 15, 1866, 50
8th	"	Dec. 1, 1866,	"	Dec. 13, 1866, 50
9th	"	Feb. 19 1867,	"	March 9, 1867, 50
				\$450

Notices of these calls were regularly forwarded to the defendant as they were voted.

The defendant on June 27, 1866, in response to calls

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then previously made, sent to the company his check for two hundred and fifty dollars, to pay the amounts then due on the first five installments, which check was subsequently paid by the defendant. None of the other installments called for have been paid by the defendant.

The questions of law arising upon the record were reserved for the advice of the supreme court of errors.

Blake, Treat, & Bullock, for the plaintiffs.

Todd & White, for the defendant.

SEYMOUR, J.—The plaintiff in this case seeks to recover from the defendant the amount of his subscription to the capital stock of the company. The action is assumpsit upon a written instrument averred to have been executed by the defendant, and described in the declaration. The defendant did not file a notice denying the execution of the instrument. The plaintiff therefore was not bound on the trial to prove its execution and delivery, by virtue of section 106 of the Act de Civil Actions.

The plaintiff claimed that under this act he was not bound to *produce* the instrument, but might regard it as proved as described in his declaration, and proceed at once to show its breach. In this we think the plaintiff is wrong. The statute was intended to dispense with the formal proof of execution, but not to dispense with the production of the writing declared on. The defendant's subscription should have been produced, or, if lost, its contents proved. After the decision of this court in the case of *Mahaiwe Bank v. Douglass*, 31 *Conn.* 170, this question is hardly an open one, and requires no discussion.

The principal matter in issue between the parties is whether the condition in article 8 of the plaintiff's

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charter has been complied with, which provides that no installment, except the first, shall be called for until at least five hundred thousand dollars of the capital stock shall be subscribed.

It is agreed that this sum had not been subscribed in the usual way of direct subscription. About two hundred thousand dollars was thus subscribed, and one Miller contracted to build the road, and take part pay in stock to the amount of three hundred thousand dollars, and the plaintiff contends that this contract of Miller amounts to a subscription within the intendment of the article of the charter on that subject. The substance of Miller's contract is that he will build the entire road of forty miles within two years from the date of the contract, and he is to have when the contract is completed, among other things, three hundred thousand dollars in the stock of the company. He failed to fulfill the contract, and became insolvent.

We are clear that this agreement by Miller is no subscription to stock within the fair meaning of the proviso. That proviso contemplated subscriptions payable in money, by installments to be regularly called in by the directors. The defendant had a right to expect and require that subscriptions like his own to the amount of five hundred thousand dollars should be made, before he should be liable for further installments after the first. The construction put upon this proviso by the plaintiff might lead, we think, to great abuses. It is important to the public, as well as to individual stockholders, that subscriptions should be *bona fide*, and that the means for building the road should be secured before the enterprise is entered upon.

It seems that the defendant submitted without objection to calls for the first five installments, and the plaintiff claims that thereby the defendant waived

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compliance with the strict letter of the proviso, and that it is now too late for him to complain of the non-fulfilment of the condition. Such payments may furnish evidence of waiver, but the finding states the mere fact of the payment, and does not detail the circumstances under which it was made. The finding in this and in some other respects seems imperfect; and in view of the whole record, we think the case should be remanded to the superior court for a new trial, and that the parties have liberty to show the facts connected with the payment of the installments, with the view of presenting more fully all that bears upon the question of waiver.

Some questions were presented relating to variances between the declaration and the proof. It is clear that the plaintiff must amend his declaration, so that the defendant's subscription shall appear to be, as it was, conditional on the five hundred thousand dollars being subscribed, and as to the other supposed variances, they can easily be avoided in the amended declaration. The points relating to these variances are not of general importance, and require no decision or discussion here.

Others concurred.

Case remanded for new trial.

Swartwout v. Michigan Air Line R. R. Co.

SWARTWOUT v. THE MICHIGAN AIR LINE
RAILROAD COMPANY.

24 Michigan, 389.

Supreme Court of Michigan; April Term, 1872.

Incorporation. Subscriptions. The associates in a railroad company, who, acting under a statute authorizing their incorporation, had elected and held meetings of directors as well as of stockholders; had made assessments upon the subscriptions to the capital stock, and collected them in part; had assigned a portion of the road for construction, and proceeded to construct the same; and had done various other acts as a corporation, and expended large amounts of money in furtherance of the object for which the company was formed, without interference by the public authorities,—*Held*, a corporation *de facto*, even if not a corporation *de jure*; and capable, as such, to maintain an action for an unpaid balance of a subscription against one of the corporators who had acted with the others in claiming and exercising corporate powers.

In such an action, questions whether there has been exact regularity and strict compliance with the provisions of the law authorizing the incorporation can not be raised. Such questions concern the state rather than individuals, and should only be raised in a proceeding to which the state has seen fit to make itself a party.

But a railroad company, although a corporation *de facto*, and entitled as such to maintain actions, can not recover upon subscriptions to its stock, without showing performance of all acts which are made, by the statute authorizing its incorporation, conditions precedent; as the procuring of subscriptions to the capital stock to a certain amount.

Subscriptions. Municipal corporations. Where the legislature has authorized a railroad company to proceed in the construction of a division of its line, and to collect the subscriptions to its stock made along such division, so soon as a certain amount of subscriptions assessable for the construction of such division is obtained, reckoning as part of that amount such aid as may be voted by any municipality along such division, the fact that such municipal aid is afterwards held void by the courts does not affect the authority to pro-

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ceed with the construction of such division. That the conditions prescribed by the legislature to the exercise of corporate powers have proved of no value does not take away the powers conferred.

Subscriptions. Where, by such a statute, a railroad company is authorized, when subscriptions, &c., sufficient to construct a division of its line, of a specified length, at a certain rate per mile, have been obtained, to proceed to elect directors, who may designate such a division for construction, and assess and enforce collections of its capital stock subscribed by persons residing along, collateral to, or within a certain distance of either terminus of such designated division, an action for an assessment upon such subscription can not be maintained without proof that the necessary subscriptions had been obtained between the two termini, or within the required distance from them, of the division designated and set apart.

It is no defense to an action for an assessment upon subscriptions to stock, that stock has been awarded to persons whose names were not on the stock book, or to those who had not actually paid in the installment required on subscribing; one who has received what he subscribed for can not complain of an award to those who could not have compelled it.

It is not a bar to an action to recover an assessment upon subscriptions to the stock of a railroad company that, pending the action, the plaintiff consolidated with another company. The cause of action does not die but passes to the new company, and this objection, if valid in any form, should be considered matter in abatement merely, and should be pleaded accordingly.

An arrangement, between the officers of a railroad company and a portion of its subscribers, that if the town in which they reside voted a certain amount of municipal aid, such subscribers, upon paying a certain percentage of their subscription, should be released from the balance, being one in effect to release a portion of the subscriptions without authority of law, is void.

A subscription to stock of a railroad, made upon condition "that the line of the road shall be located and built within one mile of" a specified point, is assessable when the road is finally located within one mile thereof, although not yet constructed.

Error from the supreme court of Michigan to the circuit court of St. Joseph county.

This was an action by the Michigan Air Line Railroad Company to recover from Swartwout an asses-

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ment upon his subscription to the capital stock of the Grand Trunk Railway of Michigan, the plaintiff claiming as successor to the rights of the latter corporation. The questions involved in the case are stated in the opinion. Judgment was rendered for the plaintiff; to review which the defendant brought a writ of error.

Severens & Burrows, and *Ashley Pond*, for the plaintiff in error.

Mason & Melendy, and *George V. N. Lothrop*, for the defendant in error.

COOLEY, J.—Swartwout was a subscriber to the capital stock of the Grand Trunk Railway of Michigan, a corporation afterwards consolidated with another, under the name of the Michigan Air Line Railroad Company. Having paid thirty-five per cent. of his subscription, he refused to pay the balance, and suit was brought for its recovery. In the circuit court the plaintiff has succeeded in obtaining judgment, and Swartwout has brought the record to this court by writ of error, assigning various errors in the rulings below.

Many of the alleged errors relate to the original organization of the Grand Trunk Railway Company under the general railroad law of the state. It is insisted, among other things, that by the articles of association one of the proposed *termini* of the road is not indicated with sufficient precision; that the meeting of stockholders for the election of directors and the permanent organization of the company, was called before the requisite amount of stock had been subscribed; that the commissioners in determining upon the call for such meeting, which could only be made after a certain amount of subscriptions had been obtained, reckoned as a part of such amount certain sums unlawfully voted by municipalities, and that the

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court erred in not allowing the defense to show, by way of establishing the failure to effect a legal organization, that some of the subscriptions to the stock were conditional, and that on some the five per cent. required by law to be paid on subscribing was not paid. It is also objected that the proceedings to effect the consolidation of the Grand Trunk Railway with another organization, before referred to, were ineffectual by reason of certain irregularities, and that the circuit court erred in holding otherwise.

Before the suit below was brought, the railroad company had held meetings as well of its directors as its stockholders ; had made assessments upon the subscriptions to its capital stock and collected them in part ; had assigned a portion of its road for construction, and proceeded to construct the same ; and had done various other acts as a corporation, and expended large amounts of money in furtherance of the ostensible object for which the company was formed. Some of these things were done before, and some after the consolidation ; and while in the proceedings of the associates there was every evidence that they intended to carry into effect the purpose indicated by their articles, we are not informed that the public authorities had interfered to call in question the validity of their assumption of corporate powers, or to take away any such powers as they might have possessed on any charge, that if originally assumed in conformity with law, they had since been forfeited.

Under these circumstances, I think the circuit judge was correct in holding that no question of the regularity of the organization of the Grand Trunk Railway, or of its subsequent consolidation, could be raised by the defendant in this suit. It will be seen that the associates, under a statute which authorized them to incorporate themselves, had taken steps for that purpose ; had assumed that the purpose was

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accomplished, and had for some time exercised corporate powers. The defendant was one of their number; he had acted with the rest in laying claim to corporate authority, and he had made payments on the assumption that the claim was well based. Important acts, extending over a long line of territory, had been done upon this assumption, and with acquiescence on the part of the public authorities. The original associates, together with those with whom they became united by the consolidation, were unquestionably a corporation *de facto*, whether they were such *de jure* or not; and as a corporation, in view of the facts in proof, it is reasonable to presume they had contracted debts and incurred obligations. The organization would be trusted in reliance upon its being the corporation it assumed to be; and parties dealing with it could not be expected to assume that the associates would be allowed to claim corporate rights for the purposes of constructing their road, and then to deny corporate existence for the purpose of avoiding the subscriptions, which were the sole consideration for their authority from the state to construct it. Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation, it is plainly a dictate alike of justice and of public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised.

The injustice of requiring of every man who may deal with the associates in reliance upon the corporate

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personality, that he should, at his peril, take notice of all failures on their part in a strict compliance with the law, and that he should raise questions of usurpation of corporate authority which the state waives or passes by without notice, is too manifest to require comment. But apart from its injustice, it is obvious that all questions of regularity in the proceedings on the part of the associates in taking upon themselves corporate functions, purporting to emanate from the sovereignty, are questions which concern the state rather than individuals, and should only be raised in a proceeding to which the state has seen fit to make itself a party.

The trial of an issue on a complaint by the state, of usurpation, would determine the matter finally, but the trial of the same issue in a suit with an individual would settle nothing for future controversies, but the same question might arise again and again, and perhaps be decided differently on different trials.

This point would have been open to no controversy whatever, had the plaintiff been organized under a special charter, and had we had no constitutional provision forbidding the granting of such charters. Proof of the charter and of *user* under it, would have been sufficient to establish a *prima facie* right in the plaintiff to sue. *Snow v. Peacock*, 2 *Carr. & P.* 215; *Dutchess Manuf. Co. v. Davis*, 14 *Johns. (N. Y.)* 245; *Williams v. Bank of Michigan*, 7 *Wend. (N. Y.)* 540; *Penobscot, &c. R. R. Co. v. Dunn*, 39 *Me.* 587; *Jamesson v. People*, 16 *Ill.* 257; *Cahill v. Kalamazoo Ins. Co.*, 2 *Dougl. (Mich.)* 124; *Way v. Billings*, 2 *Mich.* 397; *Wood v. Coosa, &c. R. R. Co.*, 32 *Ga.* 273; *Baker v. Backus*, 32 *Ill.* 79; *Cochran v. Arnold*, 58 *Pa. St.* 399; *Rondell v. Fay*, 32 *Cal.* 354; *Ang. & A. on Corp.* 354. And this *prima facie* case an individual would not be suffered to dispute, for the reason already suggested, that the question is not to be tried in a suit

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where it would only arise collaterally, and where the state, as the party chiefly concerned, could not be heard by its counsel.

As was well said by Mr. Justice BRONSON, in a similar case: "It is unnecessary to inquire what may be the rights of the people in relation to this corporation, or as against the individuals who were concerned in getting it up and setting it in motion. The defendant does not represent the sovereign power, and has nothing to do with the question whether the company should be dissolved. So long as the state does not interfere, the company may sue, or do any other lawful act, whatever sins may have been committed in bringing the body into existence." *McFarlan v. Triton Ins. Co.*, 4 *Den.* (N. Y.) 397.

But both in reason and on authority the ruling should be the same where an attempt has been made to organize a corporation under a general law permitting it. If due authority existed for the organization, and the question is one of regularity merely, "the rule established by law as well as reason is, that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the state, it is not for individuals to call them in question." SELDEN, J., in *Methodist Ep. Union Church v. Pickett*, 19 *N. Y.* 485. "Any other rule," as has been justly said in another New York case, "must be fraught with serious consequences, and great public mischief. Most of the persons who subscribe in good faith for the stock do not examine to see whether all the requirements of the statute in the organization of the corporation have been complied with; and if they did, would not probably discover defects like those now pointed out. The stock is sold in market from hand

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to hand, without any such examination. The corporation may carry on its business for years, and its stock have entirely changed hands, when its property may be destroyed by a trespasser, and in an action against him, in the name of the corporation, his only defense: 'You are not legally a corporation by reason of a defect in your constitution,' would, upon the doctrine contended for by the defendant, be successful." "The error," as is further said in the same case, "is in not recognizing the distinction between what is sufficient to constitute a corporation *de facto*, and what is necessary to constitute one *de jure*; and how and by whom a corporation *de facto* may be shown not to be a corporation *de jure*. The state alone can take advantage of a defect in the constitution of a corporation like the one in this case. In its action it will be governed by public policy and considerations." *Buffalo, &c. R. R. Co. v. Cary*, 26 *N. Y.* 77. In the case of the associates in the corporation *de facto*, and those who have had dealings with it, there is a mutual estoppel, resting upon broad grounds of right, justice, and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers. *Ewing v. Robeson*, 15 *Ind.* 29; *Armstrong v. Harvey*, 11 *Ohio St.* 527; *Brouwer v. Appleby*, 1 *Sandf. (N. Y.)* 158; *Methodist Ep. Union Church v. Pickett*, 19 *N. Y.* 485. The state itself, it has been held in this state, may be precluded by its action or neglect from denying the incorporation (*People v. Maynard*, 15 *Mich.* 463); or from taking advantage of a forfeiture after long acquiescence. *People v. Oakland County Bank*, 1 *Dougl. (Mich.)* 282.

In further illustration of these views, reference is made to *Smith v. Heidecker*, 39 *Mo.* 157; *Low v. Railroad*, 45 *N. H.* 378; *Heaston v. Cincinnati, &c. R. R. Co.*, 16 *Ind.* 275; *Society, &c. v. Commonwealth*, 52 *Fz. St.* 125; *Goodrich v. Reynolds*, 31 *Ill.* 490.

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But although the plaintiff below was a corporation *de facto*, and entitled to maintain actions as such, it may still be true that it was not authorized to recover upon subscriptions to its corporate stock. For this purpose it is not sufficient that its corporate powers are, under the circumstances, to be taken as conceded by the subscribers. The statute has pointed out certain steps which are to be taken by the corporation, and has made these conditions precedent to its right to enforce the obligations of its members. Performance of these, the incorporators have the right to insist upon ; and the plaintiff was necessitated to show such performance before recovery could have been had in this suit. The first and most important of these is, that subscriptions to a certain amount should be obtained to the capital stock. The general railroad law originally required that these subscriptions, including any municipal aid voted to the road, should not be less than six thousand dollars a mile for the whole length of the road. This amount was not claimed to have been obtained ; but the plaintiff relied upon an amendment made to the law in 1867, and which was claimed to have been complied with. The amendment was by the addition of a new section as follows :

“Section 66. Whenever any railroad company shall have filed its articles of association, as provided in the act to which this act is amendatory, and obtained sufficient subscriptions to its capital stock, including any municipal aid actually voted in its behalf by virtue of any law of this state, to construct a division of its line of not less than fifteen consecutive miles, at the rate of six thousand dollars per mile, such company shall be authorized to call a meeting of its stockholders, and elect directors of said company, in the manner prescribed in sections 4 and 5 of the act to which this act is amendatory, and said directors may

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proceed to designate a division of not less than fifteen consecutive miles of the line of said company for construction; and said company shall have full power and authority to construct, operate, and maintain a railroad upon the division of said company's line which may have been thus designated as aforesaid, and for that purpose shall have ample power to assess and enforce collection of its capital stock subscribed by persons residing along or collateral to, or within two miles of either of the termini of such designated division of said company's line, in the manner prescribed by the act to which this act is amendatory, and to receive and avail itself of the benefit of any aid that may have been or may hereafter be voted in its behalf, by virtue of any law of this state, by any municipality along, adjoining, or coterminous with such designated division of its line. But such company, for the purpose of constructing such designated division, shall not make collections from subscribers not residing along, collateral to, or within two miles of either of the termini of such designated portion of such company's line, nor to receive the aid voted or to be voted in its behalf by municipalities not situated along, adjoining, or coterminous with such designated division, except by express agreement. And said company from time to time may continue the construction of its line by designating other divisions of not less than five consecutive miles each, and may construct, operate, and maintain a railroad upon such further designated division or divisions in the same manner and with the same rights, privileges, and limitations hereinbefore specified: *Provided*, That in case of the construction by such company of a division of its line of road, as hereinbefore provided, it shall not, by reason of inability to construct any additional portion of its road, lose or forfeit any of its corporate rights, franchises, or privileges: *And provided further*, That all

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subscribers and aiding municipalities shall be liable according to the terms of their subscriptions or votes, whenever the construction of the entire line of road of said company shall have been entered upon by said company." *Mich. Sess. Laws 1867*, p. 107.

It was objected by the defendant that this amendatory act was ineffectual, because its object was not sufficiently expressed in the title. The title is: "An act to amend an act entitled, 'An act to provide for the incorporation of railroad companies,' approved February 12, 1855, being chapter 67 of the Compiled Laws of 1857, by adding a new section thereto." Although this is not as specific as might be desirable, we can not say it does not express the object of the law. The new section contains nothing which is not germane to the original act, and if the title to that was sufficient, we do not very clearly perceive why the title here in question, and which purports to add something by way of amendment, is not also sufficient. The one is no more general than the other.

It is further objected that the section added can not have effect, because inconsistent with other sections of the original act, which it does not purport to amend, and which, nevertheless, must have an amended operation by implication, to enable any effect whatever to be given to the section added. The position is, that a new statute which only purports to add a new section can not have the effect by implication to amend sections of the original act without coming directly in conflict with section 25, of Article IV. of the Constitution, which requires the sections amended to be re-enacted and published at length. But we have heretofore decided that statutes which amend others by implication are not within the contemplation of that section. *People v. Mahaney*, 13 *Mich.* 482. And in a more recent case we have applied this decision to an act which presents the point in the

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same manner in which it arises here. *People v. Wands*, 23 *Mich.* 385. I consider these cases as fully disposing of the point here referred to.

How far the original railroad law is impliedly amended by the act of 1867, I do not deem it necessary to consider in this suit. The question here arises under the new section 66; and if that is capable of enforcement, it is immaterial to the present suit whether any difficulty has been introduced in cases in which the company is not undertaking to avail itself of the provisions of that section. In any case a statute is to be so construed as, if possible, to give effect to all its provisions; and if there is any difficulty in doing that in the case of this statute, I have been unable to discover any, where the corporation is proceeding under this section 66. Reading this in connection with the previous sections, and assuming, as we must, that they were intended to be harmonious, I have no doubt the company was fully empowered to proceed in the construction of a division of its line of not less than fifteen consecutive miles, and to collect the subscriptions made along the same, so soon as the requisite six thousand dollars per mile had been subscribed which was assessable for the construction of such division, and officers had been duly chosen and the division designated. Power to do this was certainly meant to be conferred, and I think has been, in plain terms.

Acting under this authority, the company appears to have chosen officers, and to have designated a division of the road for construction. It is shown, however, that the sum of six thousand dollars per mile was made up in part of municipal subscriptions, and these being void, it is insisted that the designation of a division was also void. The legislature, it is said, intended that six thousand dollars per mile of legal subscriptions should be obtained before the road should

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be begun. We are compelled, however, to find the legislative intent in the language employed to express it; and from that language there can not be the least doubt that the intent was to reckon as a part of the six thousand dollars per mile such municipal aid as should be voted. That they expected that aid to be available, is not, I think, a fact that can affect the case. They had a right to prescribe such conditions as they pleased to the complete exercise of the corporate powers; and if those prescribed proved of no value, we can not hold their action ineffectual because they failed to prescribe others. We must be governed by what the legislature say, and can not inquire into the expectations which may be supposed to have induced them to say it. What they say is clear; their expectations we shall not undertake to speculate upon.

A further objection made on behalf of the defendant in the court below, appears to me to be one of more difficulty. By the amendatory act of 1867, the company were authorized, when subscriptions, &c., sufficient to construct a division of its line of not less than fifteen consecutive miles, at the rate of six thousand dollars a mile, had been obtained, to proceed to elect directors, and the directors might thereupon designate a division of not less than fifteen consecutive miles of the line of the company for construction, and assess and enforce collections of its capital stock subscribed by persons residing along, or collateral, or within two miles of either terminus of such designated division. The company having secured subscriptions and municipal votes to the amount of six thousand dollars a mile for that portion of their line between the city of Jackson and the west line of St. Joseph County, proceeded to designate that as a division for construction. If, then, they had ordered assessments upon the subscriptions to stock, made by persons residing along this division, or within two miles of its termini, without

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discrimination, they would have been strictly within the terms of the law. Instead of doing so, however, the directors proceeded to make of this division two subdivisions; the second of which extended from the west line of Tekonsha township, to the west line of St. Joseph County; and work was ordered to be commenced on this second subdivision, and an assessment of ten per cent. per month was made upon the subscriptions along the line thereof. It is upon this assessment that suit was brought against the defendant below.

Now the statute says nothing about subdivisions of divisions of the road, and apparently does not contemplate that any are to be made for the purposes of assessment upon stock. It authorizes a *division* to be set apart for construction, and assessments to be made thereon, but it does not authorize portions, less than a designated division, to be proceeded with by separate assessments upon the parties residing along or within two miles of it. If a division of fifteen miles can be subdivided once, it can be fifteen times, and each separate mile be covered by a separate assessment, irrespective of the amount subscribed along the same. Such a construction would defeat the manifest purpose of the statute, which plainly requires that before any person shall be compelled to make payment on his subscriptions, there shall be subscriptions, &c., either to the amount of six thousand dollars along the whole line, or to that amount along the particular portion, not less than fifteen miles, on or near which he resides, and the construction of which is ordered. The fact that subscriptions exist to an amount considerably exceeding six thousand dollars a mile between Jackson and the west line of Tekonsha, would not justify a division west of the point last named being set apart for construction and assessments, if the subscriptions along it, or within two miles of its termini, fell short of six thousand dollars a mile. For the purposes of

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an assessment either the road must be regarded as an entirety, or the separate division set apart for construction must be considered and proceeded with by itself as a whole.

The division set apart for construction in this case, was that portion of the line lying between the west line of Tekonsha and the west line of St. Joseph county. Though called a subdivision, I am of opinion that this is immaterial, and that the setting it apart was sufficient if in fact the necessary subscriptions had been obtained between the two termini, or within the required distance of them. But in the absence of any evidence that such was the fact, I think the court should have instructed the jury that this suit was not maintainable.

But as this difficulty may perhaps be obviated by a different showing on a new trial, or by a new assessment, it becomes necessary to consider some further questions which the record presents.

It is objected that the commissioners, designated in the articles of association to receive subscriptions to the capital stock of the Grand Trunk Railway Company of Michigan, had no authority to determine that the proper amount of subscriptions had been obtained for the construction of a division of the road of not less than fifteen consecutive miles, at the rate of six thousand dollars a mile, and thereupon to call a meeting to choose officers. It does not appear to me of importance in the present case whether they were or were not. The meeting was called and the officers were chosen, who were at least officers *de facto*. It must be conceded that the board of directors, and not the commissioners, are the authority to set apart a division for construction; and though the commissioners state, in their call for a meeting of stockholders to choose directors, that this setting apart had already taken place, the statement is of no importance. If

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the commissioners had assumed to take such action, it was merely void, and the proper proceedings appear to have been taken by the directors afterwards.

The question which is raised, whether stock was not awarded by the commissioners to persons whose names were not on the stock book, or to persons who had not actually paid in the required five per cent. on subscribing, is not one which is shown to concern the defendant. If one who had duly subscribed and paid his five per cent. had been deprived of the benefit of his subscription by an award of his stock to other persons, he might justly claim the proper legal remedy; but one who has received what he subscribed for can not complain of an award to those who could not have compelled it. If they accept the stock awarded to them, doubtless they are liable to the company therefor; and it was not claimed in this case, as I understand it, that the awards were colorable merely, or to persons who refuse to accept them.

It is also objected that this suit could not be maintained, because pending it, the plaintiff consolidated with another company, and thereby ceased to exist. As, however, the cause of action did not die, but passed to the new company, this, if a valid objection in any form, should be considered matter in abatement merely; and if so, should have been pleaded *puis darrein*. If it had been so pleaded, perhaps the suit might have proceeded on the proper suggestion being made. But in *Hanna v. Cincinnati, &c. R. R. Co.*, 20 *Ind.* 30, the court sustained the right of the original corporation to maintain suits on its subscriptions, notwithstanding a consolidation. The precise question raised here, namely, that the consolidated companies were no longer in being for the purposes of suits, is fully met by the decision in that case. It does not become necessary here to express an opinion whether that case was or was not correctly decided.

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The defendant also claimed that if originally liable on his subscription, he was released therefrom by an arrangement under which, if the town in which he resided voted a certain amount of municipal aid, and the subscribers to stock paid thirty-five per centum of their subscriptions, they were to be discharged from liability upon the balance. The circuit judge held this arrangement to be ineffectual. The sum agreed upon was voted, but the company never received the bonds, nor could they legally be issued. The arrangement made by the officers of the company was consequently one which was to release a portion of the subscriptions, without authority of law, and it was, of course, wholly void.

The defendant's subscription was made "upon condition that the line of the road shall be located and built within one mile of the post-office in the village of Three Rivers." The circuit judge charged the jury that he was assessable thereon when the road was *finally located* within one mile of said post-office, notwithstanding it was not yet constructed. This view of the subscription is supported by the case of Chamberlain v. Painesville, &c. R. R. Co., 15 *Ohio St.* 225, in which parties promised to pay the company certain sums "provided that said road is permanently located through the village of Chagrin Falls, or within one hundred and sixty rods of the High Falls, so-called, near A. C. Gardner's mill; and that a freight-house or depot be erected or built on the line of said road, within one hundred and sixty rods of said High Falls." The court was of opinion, in that case, that the only condition to the payment of the subscriptions was the permanent location of the road; and that the clause regarding the freight-house and depot was to be looked upon as a stipulation merely, which the company undertook to perform at the appropriate time. I am inclined to think a similar construction

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was intended by the parties when the subscription now under consideration was made and received. When can a road be said to be "built" within one mile of a specified point which it is to pass? Is it when a piece a rod in length, or a mile, or any other given distance is constructed, though such fraction of the road may be unavailable for use, and of no possible value to the subscribers? Or is it only when the whole line is constructed? If the first, then obviously the stipulation as a condition precedent is of little or no importance; and the subscription can scarcely be supposed to intend the entire completion of a long line like the one here proposed, when possibly the local advantages expected by the subscribers from the road, and which were stipulated for in the acceptance of these subscriptions, might be fully afforded by a division; as, for instance, by that portion of the road from Jackson to Niles. Subscriptions to the stock of a railroad company are usually expected to provide a fund to build with; that is what the statute contemplates; and if such were not the intent here, and the parties designed to make their promises conditional on the completion of the railroad, either as an entirety or for any given distance, it is scarcely probable that they would have left their stipulation so indefinite and so much open to conjecture. The permanent location of the road within a mile of the Three Rivers post-office would have furnished the company's assurance of their intention to build it there; and that assurance the subscribers were undoubtedly entitled to; but had it been their understanding that the sums subscribed were not to be available to the company for the purposes of a construction of their road, but payable only when the road was wholly completed, it is only reasonable to infer that they would have expressed that intent more clearly, and would have indicated with definiteness what stage the work should

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reach before their liability should become fixed. In considering the proper construction of the contract, it is to be borne in mind that the general law prescribes what shall be the obligation of parties upon their subscriptions to stock, and as a matter of public policy, the subscriptions it provides for are unconditional, in order that a proper and reliable fund may be provided, which can be made available for construction before the construction is entered upon. When, therefore, a party claims that he has stipulated for exemption from the statutory liability, it is but reasonable to require that the stipulation be clear and free from reasonable doubt in its terms; for all intendments of law must be against an intent that the contract which is prescribed alike by the statute and by public policy, should be modified beyond what is plainly expressed.

The only other error assigned, which it is deemed important to notice here, relates to the circuit judge having read to the jury section 66 of the general railroad law without making it a part of his written charge. The statute of 1869 requires the whole charge to be in writing and filed. *Mich. Sess. Laws 1869*, vol. 1, p. 113. The object of that statute is supposed to have been to hold the circuit judges to a more strict accountability, and to insure to parties the benefit of all legal exceptions.

The spirit of the statute appears to me to have been complied with in this case. The party is as fully protected as if the statute had been copied into the charge. If the jury were to take the charge with them to their rooms, it might be different; but when it is only to be filed, and there is proper reference in it to any statute read, I think it sufficient. Had something besides a general law of the state been thus referred to, perhaps the conclusion should have been different; but it appears to me that in this the judge committed no error.

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For the error before pointed out, the judgment must be reversed, with costs, and a new trial ordered.

Others concurred.

Judgment reversed.

THE CHICAGO, QUINCY, & BURLINGTON RAIL-
ROAD COMPANY v. OTOE COUNTY.

16 Wallace, 667.

*Supreme Court of the United States ; December Term,
1872.*

Municipal corporations. Bonds. The legislature of a state, in which general legislative power is vested by the state constitution, and which is not restrained therefrom by any constitutional prohibition, may authorize a county to aid the construction of a railroad by issuing county bonds and making them a donation to the railroad company, even although the railroad is wholly outside the county and outside the state, if the purpose of the road be of public interest to the people of such county.

A special act of a state legislature authorizing the issue of bonds by a county without complying with the requirements of a previous statute, is not necessarily invalid. Such requirements may be abrogated or annulled by subsequent legislation.

Certificate of division to the supreme court of the United States from the circuit court of Nebraska.

This was an action by the Chicago, Quincy, & Burlington Railroad Company against the county of Otoe upon the coupons of certain bonds issued by that county.

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The issue of these bonds was originally authorized by an act of the legislature of the territory of Nebraska, approved January 1, 1861, which enacted :

“That the commissioners of any county should have power to submit to the people of any county at any regular or special election, the question whether the county will aid or construct any road ; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition as provided in this section.

“When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section 16 of this chapter ; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred.”

In pursuance of this act, the commissioners of Otoe county ordered an election to be held on March 17, 1866, in that county, to ascertain whether the commissioners should issue bonds of the county not to exceed two hundred thousand dollars, for the purpose of securing an eastern railroad connection for Nebraska city, N. T.

An election was held accordingly, and at it a large majority of the votes cast were in favor of the proposition.

The Council Bluffs & St. Joseph Railroad Company having built a railroad from Council Bluffs, in Iowa, to St. Joseph, in Missouri, near Nebraska city, forty thousand dollars of the bonds of Otoe county, so voted for, were issued to it ; the bonds having been issued to secure an eastern railroad connection, and the same having been secured by way of St. Joseph and Council Bluffs.

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After this, Nebraska was admitted into the Union ; and adopted a state constitution containing the following provisions :

"The legislative authority of the state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.

"The property of no person shall be taken for public use without just compensation.

"The credit of the state shall never be given or bound in aid of any individual association or corporation.

"For the purpose of defraying extraordinary expenses the state may contract public debts, but such debts shall never in the aggregate exceed fifty thousand dollars.

"All powers not herein delegated remain to the people."

This constitution being in force, the legislature of the state passed an act in these words :

"WHEREAS, the qualified electors of the county of Otoe, and State of Nebraska, have heretofore, at an election held for that purpose, authorized the county commissioners of said county to issue the bonds of said county in payment of stock to any railroad in Freemont County, Iowa, that would secure to Nebraska City an eastern railroad connection, to the amount of \$200,000 ; and whereas but \$40,000 have been issued.

"SECTION 1. *Therefore, be it enacted, &c.,* That said commissioners be, and they are hereby authorized to issue \$150,000 of the bonds aforesaid to the Burlington and Missouri River Railroad Company, or any other railroad company that will secure to Nebraska City a direct eastern railroad connection, *as a donation to said railroad company*, on such terms and conditions as may be imposed by said county commissioners.

"SECTION 2. Said bonds, when so issued, are here-

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by declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled 'An act to enable counties, cities, and precincts to borrow money or to issue bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purpose, approved February, A. D. 1869.'

The Burlington & Missouri River Railroad Company named in this act was a corporation created by the laws of the state of Iowa; and its railroad was entirely without the territory of Nebraska.

After the passage of this act, the board of county commissioners of Otoe county, reciting that the people of the county had voted two hundred thousand dollars in bonds, in aid of an eastern railroad connection, of which bonds there remained unappropriated over one hundred and fifty thousand dollars, passed a resolution to the effect that if the said Burlington and Missouri River Railroad Company would within a limited time named, build a certain road described (which it was stated the company proposed to build, upon the condition that Otoe county "will *donate and give* to said company" one hundred and fifty thousand dollars in the bonds above referred to); and if the said company would equip and work the said road as a through eastern connection, then the county commissioners would issue and deliver to the said railroad company one hundred and fifty thousand dollars of the said bonds theretofore voted by the said county to such eastern connection; the resolution to operate as a contract between the county and the railroad company, if accepted by the latter within a time named. The resolution was accepted by the railroad company. The Burlington & Missouri River Railroad Company within the time built and has ever since worked a railroad such as was contemplated.

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The county commissioners also passed a resolution directing the county clerk to deliver to the railroad company the bonds with the coupons attached, which was by him accordingly done on September 27, 1869. There was no vote of the people other than that above mentioned authorizing the issue of said bonds to said company.

The Burlington & Missouri River Railroad Company sold and transferred the bonds with the coupons attached, for value, and before maturity of any of the coupons, to the Chicago, Quincy, & Burlington Railroad company, a corporation of Illinois. The coupons as they came due were detached from their respective bonds; but not being paid, that company brought this action.

On the trial, the judges were divided in opinion on the following questions:

First. Whether or not the act of February 15, 1869, authorizing the county to issue bonds in aid of a railroad outside of the state, conflicted with the constitution of the state of Nebraska.

Second. Whether the county commissioners of Otoe county, under the act of February 15, 1869, could lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same, being or having been submitted to a vote of the people of the county as provided by the act of the territorial legislature of Nebraska, approved January 1, 1861.

These questions were accordingly certified to the supreme court.

J. M. Woolworth, for the plaintiff.

G. B. Scofield, for the defendant.

STRONG, J.—The first question upon which the

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judges of the circuit court divided was whether the act of the legislature of Nebraska, approved February 15, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the state, conflicts with the constitution of that state.

Unless we close our eyes to what has again and again been decided by this court, and by the highest courts of most of the states, it would be difficult to discover any sufficient reason for holding that this act was transgressive of the power vested by the constitution of the state in the legislature. That the legislative power of the state has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the federal constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a state constitution. The legislature of a state may exercise all powers which are properly legislative, unless they are forbidden by the state or national constitution. This is a principle that has never been called in question. If, then, the act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the constitution of the state against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every state legislature upon which has been conferred general legislative power. These things are necessarily done by law. The state may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to

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establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a state legislature, or to some law that authorized a municipal division of the state to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad, is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the states have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate.

Then what is there in the constitution of the state of Nebraska which denies this power to the legislature? There is no direct or express prohibition. General legislative power is vested in the legislature. None was reserved to the people of the state. There are, however, certain restrictions that may be noticed. The constitution declares that "the property of no person shall be taken for public use without just compensation," and it is earnestly contended that this prohibits the legislature from passing any laws in aid of the construction of a railroad that may result in the imposition of taxes. It is said that the act of February 15, 1869, is taking private property for a public use without compensation. It would be a sufficient answer to this to say that a similar provision is found in the constitution of almost every state, the legislature of which has been held authorized to legalize municipal

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subscriptions in aid of railroad companies. It has never been held to prohibit such legislation as we are now considering. But the clause prohibiting taking private property for public use without just compensation has no reference to taxation. If it has, then all taxation is forbidden, for "just compensation" means pecuniary recompense to the person whose property is taken, equivalent in value to the property. If a county is authorized to build a court-house or a jail, and to impose taxes to defray the cost, private property is as truly taken for public use without compensation as it is when the county is authorized to build a railroad or a turnpike, or to aid in the construction and to levy taxes for the expenditure. But it is taken in neither case in the constitutional sense. The restriction is upon the right of eminent domain, not upon the right of taxation.

We find nothing else in the constitution of the state that with any reason can be claimed to restrain the power of the legislature to authorize municipal aid to railroads, or other highways. There is a clause that declares "the credit of the state shall never be given to, or bound in aid of any individual, association, or corporation," and another that ordains that the debts of the state shall never, in the aggregate, exceed fifty thousand dollars, but these refer only to state action and state liability. *Patterson v. Yuba County*, 13 *Cal.* 175. In view, therefore, of the organic law of the state, and of the decisions which have been made in regard to other similar constitutional provisions, both in the highest courts of the states and in this court, we think it can not be doubted the legislature of Nebraska had authority to authorize its municipal divisions to incur indebtedness and to impose taxation in aid of railroad companies.

It is urged, however, against the validity of the act now under consideration, that it authorized a donation

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of the county bonds to the railroad company, and it is insisted that if even the legislature could empower the county to subscribe to the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road ; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country ; both may be equally burdensome to the taxpayers of the county. The stock subscribed for may be worthless, and known to be so. That the legislature of the state might have granted aid directly to any railroad company by actual donation of money from its treasury will not be controverted. No one questions that in the absence of some constitutional inhibition the power of a state to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly, nothing has been more common in the state and federal governments than appropriations of public money raised by taxation to objects, in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes, wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents. But if a state can directly levy taxes to make donations to improvement companies, or to other objects which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not con-

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fer upon its municipal divisions power to do the same thing. Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the state, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the state through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the taxpayers of the state, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. A few only are cited. *Blanding v. Burr*, 13 *Cal.* 343; *Guilford v. Chenango County*, 13 *N. Y.* (3 *Kern.*) 149; *Stuart v. Supervisors*, 30 *Iowa*, 9; *Augusta Bank v. Augusta*, 49 *Me.* 507; *Railroad Co. v. Smith*, a case decided by the supreme court of Illinois and not reported.

One other objection to the constitutionality of the act is urged. It is that it authorized aid to a railroad beyond the limits of the county, and outside the state. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the state had an interest, and it is very obvious that the interests of the people of Otoe County may have been more involved in the construction of a road giving them a connection with an eastern market than they could be in the construction of any road wholly within the

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county. But that the objection has no weight may be seen in *Gelpcke v. Dubuque*, 1 *Wall.* 175, and in *Walker v. Cincinnati*, 21 *Ohio St.* 14.

We conclude, therefore, that the act of the legislature of February 15, 1869, is not in conflict with the constitution of the state.

The second question upon which the circuit court divided was, "whether the county commissioners of Otoe county could, under the act of February 15, 1869, lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the territorial legislature of Nebraska, passed January 1, 1861."

This question we answer in the affirmative. If the legislature had power to authorize the county officers to extend aid on behalf of the county or state to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended, as well as the terms and conditions of the extension, and it needed no assistance from a popular vote of the municipality. Such a vote could not have enlarged legislative power. But the act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that their assent had been obtained. That prior to 1869 the sanction of approval by a local popular vote had been required for municipal aid to railroad companies, or improvement companies, is quite immaterial. The requisition was but the act of an annual legislature which any subsequent legislature could abrogate or annul.

It must, therefore, be certified to the circuit court, *First.* That the act of February 15, 1869, is not uncon-

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stitutional ; and, *Second*. That the county commissioners of Otoe county could lawfully issue the bonds from which the coupons in suit were detached, without any submission to a vote of the people of the county, of the proposition to approve the bonds, or a tax for the payment thereof.

CHASE, Ch. J., and MILLER and DAVIS, JJ., dissented.

Others concurred.

Certified accordingly.

KENICOTT v. WAYNE COUNTY.

16 Wallace, 452.

Supreme Court of the United States ; December Term, 1872.

Municipal corporations. A state statute authorizing any county through which a railroad may run to aid in the construction of the road, does not require that the road to be aided should be actually built before the aid shall be given. Such an act implies that the aid is to be given before the road is built ; and the counties giving the aid are to take the ordinary risk of the success of the undertaking in which they embark their property.

Municipal corporations. Railroad connections. The charter of a railway company provided that any county through which its road might run, "and every county through which any other railroad may run with which this road may be joined, connected, or intersected," might aid in the construction of such road. Another company was chartered to build a railroad from one terminus of the

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road of the former company completely through a county adjoining the county in which the former road lay. The company first chartered undertook the construction of the new road from the terminus of its own road onwards completely through the other and adjoining counties. *Held*, that the grant of authority to construct the connecting road, and the entering into a contract for its construction, constituted a connection, within the meaning of the provision of the charter cited.

Mortgages. Where negotiable bonds of a railroad company secured by mortgage are in the hands of a *bona fide* holder for value, and a bill is filed by him to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed in an action at law upon the bonds.

Appeal to the supreme court of the United States from the circuit court for the southern district of Illinois.

This was an action by Kenicott and others, citizens of Massachusetts, against the Supervisors of Wayne County, Illinois, impleaded with the Mount Vernon Railroad Company, to foreclose a mortgage upon lands of the county given to secure the payment of bonds of the railroad company. The questions involved and the facts upon which they arose, are stated in the opinion. At the hearing the bill was dismissed. From this decree the plaintiffs appealed.

W. B. Scates, for the appellants.

J. C. Robinson, for the appellees.

HUNT, J.—The following propositions may be considered as settled in this court:

1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer,

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or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists, or has taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds.

2. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, can not be urged against a *bona fide* holder seeking to enforce them. *Grand Chute v. Winegar*, 15 *Wall.* 355; *Knox County v. Aspinwall*, 21 *How.* 539; *Gelpcke v. Dubuque*, 1 *Wall.* 203; *Moran v. Miami County*, 2 *Black*, 722.

3. There must, however, be an original authority, by statute, to the municipality to issue the bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns without special authority. *Marsh v. Fulton County*, 10 *Wall.* 676.

The alleged absence of such authority is the basis of the defense to the mortgage sought to be foreclosed in the present action. Four several and distinct grounds on which such power is based are urged by the plaintiffs. But one of these will be examined. The court is satisfied with the authority to be found in section 10 of the act to incorporate the Mount Vernon Railroad Company. An examination of the others is not necessary.

The town of Mount Vernon is situated in Jefferson county, and some eighteen miles easterly of the Illinois Central Railroad. This road passes within a short distance of the westerly line of said county, and nearly parallel with it. Wayne county is still east of Jefferson county, the whole of the latter county lying

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between Wayne and the Illinois Central road. In the month of February, 1855, the legislature of Illinois passed an act to incorporate the Mount Vernon Railroad Company, for the purpose of building a railroad from Mount Vernon to the Illinois Central Railroad, or to its Chicago branch. Section 7 of the act provided that the company might borrow money and secure the same by bond or mortgage. By section 8 it was enacted that the county of Jefferson might issue its bonds and provide for the payment thereof by the sale or mortgage of its swamp or overflowed lands, or that they might make such other disposition of the lands in aid of the construction and maintenance of the railroad as they deemed best for the public interests of the county.

Section 9 provided that the question of aiding the railroad, and of the mode in which such aid should be given, should be submitted to the decision of the voters of the county.

Section 10 was in the following words :

"Any county through which said road may run, and every county through which any other railroad may run, with which this road may be joined, connected, or intersected, may, and are hereby authorized and empowered to aid in the construction of the same or of such other road with which it may so connect ; and for this purpose the provisions of the seventh, eighth, and ninth sections of this act shall extend, include, and be applicable to every such county, and every such railroad."

The provisions of sections 7, 8, and 9, of the charter of the Mount Vernon Railroad Company, were thus made applicable to any other county than that of Jefferson, through which that road should run, or through which any other railroad should run which might join, intersect, or connect with the Mount Vernon road. Such other county was expressly authorized to

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aid in the construction of the Mount Vernon road, or of such other road with which it might so connect.

No reasonable construction of this act will require that the road to be aided should be actually built before the county was authorized to give it aid. That theory would, no doubt, add greatly to the security of the county, and would relieve it from many of the perplexing questions which so commonly arise. If, however, the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished. The language of this act expressly authorizes the swamp or overflowed lands to be used by the counties in aid of the construction of the road, and it seems to be quite plain that the aid was intended to be given before the road was built, and that the counties were expected to take the ordinary risk of the success of the undertaking in which they embarked their property.

The county of Wayne held an election in November, 1858, and voted that these lands should be applied in aid of any company that would build a railroad through the county. Soon after this time, Van Duser & Smith entered into a contract with Wayne county for building that part of the road of the Belleville and Fairfield company lying between the east line of Wayne county and Mount Vernon, thus running across the entire width of Wayne county. This contract was assigned to the Mount Vernon Railroad Company, who undertook the construction of this portion of the road.

The county of Jefferson entered into a like contract for the construction of the Mount Vernon road, from Mount Vernon to the Illinois Central.

It was for the purpose of aiding in the construc-

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tion of the road thus undertaken to be built by the Mount Vernon Railroad Company, from the east line of Wayne county to Mount Vernon, the charter of that company also requiring its road to be built from Mount Vernon to the Illinois Central, that the bonds in question were issued. They were sold under the authority of the county of Wayne, by its agents, and the proceeds were applied as was intended by the county. The Belleville & Fairfield Railroad Company, afterwards changed to the St. Louis & Louisville Railroad Company, was chartered for the construction of a railroad from St. Louis, on the Mississippi, to Mount Carmel on the Wabash river. Its proposed line crossed the Illinois Central, and was located directly through five different counties, among which was the county of Wayne. It was that portion of the line of this road through the county of Wayne that was located and surveyed by the Mount Vernon Railroad Company, and of which the construction was undertaken by that company, as the assignee of Van Duser & Smith. Some portion of the work had then been done. This brought the county of Wayne within the terms of section 10, already quoted, and authorized its action in the issue of bonds, to aid in its construction.

These were existing contracts, under which the contracting parties were taking efficient measures for the construction of the road. Those contracting parties could make no objection to the power of the counties so to contract. The contracts were valid and obligatory against them, and would be effectual, if carried out, to make the railroad connections needed by the county.

The authority to construct the connecting road, and the entering into a contract for its construction, formed a connection within the meaning of section 10.

Such was also the opinion and the assertion of the county of Wayne, when, in November, 1856, it con-

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veyed these lands to Charles Wood, in trust for certain railroads that should build a road through that county.

The deed to Wood recites that a connection had been made between the Mount Vernon road and the others mentioned, that a vote had been taken in the county of Wayne, authorizing that deed, and that it was made in pursuance thereof. This deed was recognized and confirmed by the legislature, and expressly declared to be valid in the passage of the act of February 14, 1857, to amend the charter of the Belleville & Fairfield Railroad Company. The lands were afterwards reconveyed to the county by Mr. Wood.

Holding that there was valid power for the giving of the mortgage in question by the county of Wayne, under section 10 of the Mount Vernon charter, and that there was, in fact and in law, a sufficient connection with other roads, we do not deem it necessary either to examine the other alleged sources of authority for the execution of the mortgage, or the alleged acts of the county in confirmation of it. Under the circumstances stated, we are also of the opinion that there was a sufficient submission of the question to the voters of the county, and that as against *bona fide* holders for value, the question is not an open one. It has been decided at the present term of this court, that where a note secured by a mortgage is transferred to a *bona fide* holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the note. *Carpenter v. Longan*, 16 *Wall.* 271.

In this action to foreclose the mortgage, the case stands in this respect as it would stand had the present suit been brought directly upon the bonds, and without reference to the mortgage.

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The execution of the deed and mortgage by Wilson and Scott, the judges of the county court of Wayne county, and on behalf of the county, was a sufficient execution by the county. In the mortgage and trust deed all the proceedings to authorize a conveyance by the county are recited—the title of the swamp lands in the county through an act of Congress; the authority of the state to dispose of the same by the courts or county judges; the passage of the act incorporating the Mount Vernon Railroad Company—and that the parties of the first part were duly authorized on behalf of the county to make disposition of the land in aid of the construction of the railroad; that the question had been referred to and passed upon by the voters of the county; that, by virtue of all the proceedings recited, the said judges, parties of the first part, had become endowed with power to dispose of the lands; therefore they conveyed, as set forth. This conveyance was, on April 20, 1859, by an order that day entered in its minutes, recognized and confirmed as the act of the county of Wayne by its authorized agents, and by which the lands were mortgaged and conveyed. Section 7 of the Mount Vernon Railroad act, above referred to, vests the power to dispose of these lands in the county court. This body must act by agents, and none can be more suitable and appropriate than the judges of the court. By section 2 of the act to dispose of swamp and overflowed lands, passed January 22, 1852, it is provided that in the cases mentioned in section 1, the deed of conveyance shall be made by the judges of the county court as such, and countersigned by the clerk with his official seal. In reference to sales at auction, it is provided by section 11 that a conveyance shall be executed by “the court, signed in their official capacity,” and countersigned by the clerk. The signature of the clerk is nowhere declared to be an absolute pre-

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requisite. In effect this was a conveyance on behalf of the county, by their agents for that purpose duly appointed. By section 7 of the Mount Vernon charter the county court was authorized to sell or mortgage the lands, or to make such other disposition of them "as they may deem best for the public interest." No mode was pointed out in which a conveyance should be made. No particular signature was made a condition to the validity of the conveyance. There is no ground for the objection to the form here adopted, viz, by a deed of trust and mortgage, signed by the judges of the county court. In form and in substance the deed was well executed, and valid as the deed of the county.

The objection to the word "bonus" in the proposition submitted to the voters of Wayne county is not valid. This submission, in connection with the general subject of a failure to comply with the requisites prescribed by the statute, has been already discussed. Upon its individual merits we are also of the opinion that the objection is not valid. It is a verbal criticism merely—an objection to the words and not to the substance of the submission. A proposition was submitted to the voters, of which the affirmative was in these words: "For appropriating the swamp lands of Wayne as a bonus to any company for building a railroad through said county." It is said that the word "bonus" condemns the submission; that this word means a gratuity, a voluntary donation, a gift, and that a town or county can not, although it have the direct authority of the legislature, give away its property. When this question is properly before us it will be disposed of. It does not, however, arise in this case. In the first place, if it be assumed that the word is correctly defined as a gift, or gratuity, that meaning is controlled and limited by the connection in which it is here used, to wit, that in consideration of

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it the company receiving the lands will undertake to build a railroad through the county. It is not simply a *bonus*, but a bonus to any company who shall undertake the great task of building a railroad through the county, a task which, it is loudly complained, has not yet been performed by any one.

But, secondly, the meaning of the word *bonus* is not that given to it by the objection. It is thus defined by Webster: "A premium given for a loan or a charter or other privilege granted to a company; as, the bank paid a *bonus* for its charter; a sum paid in addition to a stated compensation." It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given.

Upon the principles announced in the opening of this opinion, the plaintiffs are entitled to a judgment for the amount of the bonds held by them. If we are right in the positions taken, there was indeed no real defense to the bonds.

We think there was error in the decision of the case; that the judgment must be reversed, and a new trial had.

MILLER and FIELD, JJ., dissented.

DAVIS, J., did not sit.

Others concurred.

Judgment reversed.

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THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* THE CHICAGO & ROCK RIVER RAILROAD COMPANY *v.* DUTCHER.

56 Illinois, 144.

Supreme Court of Illinois ; September Term, 1870.

Municipal corporations. Elections. Where an act of the legislature empowers cities, towns, and townships to subscribe to the stock of a railroad company, when authorized by a majority of the legal votes of the particular city, town, or township, but prescribes no mode in which such election shall be held, an election under the act must be conducted in the manner prescribed by the law of the organization of the body in which it is held. Thus, an election in a township for such purpose should be held in the manner in which township elections are required to be held in electing town officers, and not in the manner prescribed by the general election laws.

Municipal corporations. Subscriptions. Where a statute, empowering a town to subscribe to the stock of a railroad company, when authorized by a majority of the legal voters therein, requires the town supervisor to make the subscription if it be so voted, but leaves the question of subscription wholly to the determination of the voters, the town may, in determining that question, impose conditions upon its subscription, although a conditional subscription is not expressly authorized by the statute. And, if conditions are imposed, the town supervisor has no power to disregard them, nor can the railroad company compel him, by mandamus, to make an unconditional subscription.

Mandamus from the supreme court of Illinois.

This was an application for a writ of mandamus upon the relation of the Chicago & Rock River Railroad Company against Frederick R. Dutcher,

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supervisor of the township of Amboy. The history of the case, and the questions involved, are stated in the opinion.

J. M. Bailey, for the relators.

W. E. Ives, for the respondent.

WALKER, J.—This is an application to this court for a writ of mandamus against the supervisor of the township of Amboy, to compel the subscription of one hundred thousand dollars to the stock of the company of petitioners. On filing the petition by the company, the defendant entered his appearance, waived the issuing of an alternative writ, and stipulated that the petition might stand for an alternative writ, and demurred to it. It appears from the writ that, by the charter of the company, cities, towns, and townships, along or near to the railroad, were authorized to subscribe to the capital stock of the company, when authorized by a majority of the legal votes of such city, town, or township, cast at an election authorized to be held, upon the petition of ten voters of the city, town, or township, and a notice given for thirty days of the time, and at the usual place of holding elections. The charter also provides that if the election results in favor of subscription, it shall be the duty of the officers named in the act to make the subscription and receive from the company the proper certificates therefor, and to issue bonds of the corporate body thus voting in favor of subscription, bearing interest, and which shall not run for more than twenty years, &c.

It is alleged that on June 25, 1869, after giving notice for the requisite time, an election was held, resulting in favor of subscription for one hundred thousand dollars of the stock of the road. The township clerk, after reciting that portion of the charter

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which authorized the township to vote for and against the subscription, gave this notice :

"Now, therefore, I, Charles E. Ives, clerk of said township of Amboy, do hereby notify the legal voters of the said township of Amboy, to meet at Simon Badger's office, on July 26, A. D. 1869, for the purpose of voting for or against the said township subscribing one hundred thousand dollars to the capital of the Chicago & Rock River Railroad Company, upon the express condition, however, that should the legal voters vote in favor of the subscription, that none of the town bonds will be delivered until the road is completed into the township of Amboy, and cars running on the same. The form of voting at said election will be, 'For subscription,' or 'Against subscription.'

"Given under my hand this 25th day of June, A. D. 1869."

It is urged that the election thus held was invalid, for the reason that it was held in the manner regulating town meetings, and not under the general election laws of the state ; because there was no registration of the voters, and because certain conditions were imposed not specified in the statute authorizing the election to be held.

Do the provisions of the charter authorizing the vote in this case require that it shall be under the general election laws, or under the law establishing township organization? Amboy being a township organized under the general township law, the presumption would be, unless a contrary intention was expressed, that the election should be held in the mode prescribed for its government. Where legislation is adopted in reference to the action of an incorporated body, and no mode is prescribed in which it shall be performed, the presumption must be indulged that it is intended that the body shall act through its officers and in the course usually adopted and author-

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ized by the law governing the action of the body. And this being the rule, when the legislature has authorized this township as a corporate body to hold an election, and has prescribed no mode, a majority of the court hold that it was designed to authorize it to be in the manner township elections are required to be held in the election of their officers, and not under the general election laws. And it appears that this election was conducted in conformity to the law of its organization. And in this there was no error.

Was this a state, county, city, or town election, in the sense of the law which has provided for the registry for such elections? The law requiring the registry to be made declares that the registry shall be made three weeks previous to any state, county, city, or town election, except town meetings in towns adopting the township organization law. *Ill. Sess. Laws 1865*, p. 51. The exception contained in this clause is not sufficiently explicit to leave it free from doubt in its construction. But Article V. of the act providing for township organization relates to and governs town meetings. It provides for the manner of conducting the business of the town and for electing town officers. The latter, with some exceptions, are required to be elected by ballot. Nor do the different provisions of the article make any distinction in the meetings, between the transaction of the business of the town and the election of officers. It is all required to be done at the town meeting, although it is called an election when choosing the officers, and a town meeting when transacting other business. Article IV. requires the regular town meetings to be held on the first Tuesday in April of each year, and the voters are then authorized to elect town officers and, quadrennially, justices of the peace and constables.

Such an election being at a town meeting, it is manifestly not embraced in the registry law, as such

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meetings are excluded, in terms, from its operation. And inasmuch as the statute contemplated the vote on this subscription to be taken in the town in the mode other town elections are held, and such elections being excepted from the provisions of the registry law, it follows that a registry of the voters was not necessary to this election, and there was not a want of power to hold it by reason of the failure to make a registry of the voters of the town.

In the case of *Boren v. Smith*, 47 *Ill.* 482, it was held, that a vote on the re-location of a county seat was not an election, within the registry law. Again, in the case of *People v. Ohio Grove*, 51 *Id.* 191, where an election was held to vote for and against a subscription to the stock of a railroad company, held on a ten days' notice, authorized by the statute, it was held, that the registry law was not intended to be applied, because there was not time within which to prepare the registry before the election. In that case it was, for that reason, deemed unnecessary to determine whether the registry law applies to town meetings, and hence the question was not decided.

We now come to the question whether the notice containing the condition that the road should be completed into the township and cars running on the same, vitiates the election, and failed to confer power to make the subscription. It is true, the law has failed to authorize conditions to be imposed by the voters, but it has not prohibited their imposition. It is not, nor can it be, denied, that an individual may or not subscribe to such a corporation, as he may freely choose, and he may impose any condition he desires to such a subscription, and it then is within the free choice of the company whether it will accept the subscription on the conditions. And the general assembly has left it to the voluntary determination of the voters of the town to say whether they would

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subscribe for the stock, or refuse to do so, by their vote. And if it was a matter of choice whether they would or not make such subscription, then why might they not impose any condition they desired, and, when imposed, why should the company be at liberty to compel an unconditional subscription to which the voters have not and probably never would assent? We have no hesitation in saying, that the electors might vote to subscribe on any conditions they might see proper to annex, and that the company can only receive it on the terms prescribed by the vote.

The township has no power to compel the railroad company to accept a conditional subscription. Nor can the company compel an unconditional one. In the case of *People v. Tazewell County*, 22 Ill. 147, it was held, under the general law, that it was discretionary whether the county should subscribe all or but a portion of the amount voted by the citizens, and that the county authorities might impose any proper conditions they might choose. And the same rule must apply to the voters of a town, in determining whether they will make a subscription. In the case at bar, the law declares that, if the vote results in favor of subscription, it shall be the duty of the supervisor to subscribe to the capital stock of the company, in the name of the township, the amount voted to be subscribed, and to receive a certificate therefor.

In the case at bar, the relator claimed the right to an unconditional subscription, and it is the purpose of this proceeding to compel the supervisor to make such a subscription. We have seen that he is not authorized, under any circumstances, or at any time, to make a subscription upon any but the conditions it was voted. It then follows that the supervisor can not be compelled to make an unconditional subscription, and the peremptory writ must be denied.

Mandamus denied.

Pendleton County v. Amy.

PENDLETON COUNTY v. AMY.

13 *Wallace*, 297.*Supreme Court of the United States ; December Term,
1871.***Municipal corporations. Bonds. Subscriptions in aid of railways.**

Where a state legislature has authorized a county to issue negotiable bonds in payment of a subscription to the stock of a railroad corporation, which subscription and issue of stock are authorized only upon certain prescribed conditions, and after certain things directed have been performed, a failure to perform all the conditions or take all the steps prescribed by the legislature, is not always available as a defense to the bonds, against an innocent purchaser. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it is coupled with conditions precedent. In some cases it may fairly be presumed, in favor of an innocent purchaser, that the conditions have been fulfilled. Such presumption is proper where the county has received, in exchange for the bonds, a certificate for the stock of the railroad company, which it has held for years before suit brought, and still holds.

Municipal corporations. Bonds. Estoppel. Where, under such legislative authority, a county had issued bonds in payment of a subscription to stock of a railway company, and had received in exchange for the bonds a certificate for the stock of the railway company, which it held seventeen years before suit was brought, and still continued to hold,—*Held*, that the county was estopped from asserting, against an innocent purchaser of the bonds for value, that the bonds were issued in disregard of the conditions prescribed by the legislature.

Pleading. In an action upon coupons of railroad bonds payable to bearer, the declaration alleged the plaintiff to be the owner, holder, and bearer of the coupons.—*Held*, that a plea that the plaintiff was not, either at the time of filing the declaration or the plea, the owner, holder, or bearer, although faulty as argumentative, was a

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traverse of a material allegation of the declaration, and must be sustained as against a general demurrer.

A plea to the same declaration, that at the times named the bonds and coupons were all the property of one R., a citizen of the same state as defendant, and not of any other person,—*Held*, good, upon general demurrer.

The same declaration alleging that the coupons sued on were for interest on bonds that had been issued by a county, and delivered by it to a certain railroad company, in payment by the county of a subscription to stock of the road, under an authority given by acts of the legislature,—*Held*, that a plea that the county did not sign, seal, or deliver the bonds and coupons to the company as alleged, and “so that the alleged acts and coupons are not its acts and deeds,” was good, upon general demurrer.

Error from the supreme court of the United States to the circuit court for the district of Kentucky.

This was an action by Amy against the county of Pendleton, in the state of Kentucky, to recover the amount of certain coupons or interest warrants attached to bonds of the county. The declaration alleged that the bonds were made and issued by the county, under authority conferred by the legislature of the state; that interest warrants were attached to the bonds, payable to the bearer semi-annually; that the bonds were delivered to a certain named railroad company in payment of a subscription made by the county to the stock of the company, under authority of certain acts of the legislature; that the bonds were received by the railroad company, and a certificate for the shares of stock subscribed for by the county was issued to the county, and was received by it, and that it was still owned by the county; that the bonds were afterwards sold by the railroad company and delivered to the purchasers with the coupons attached; that the plaintiff subsequently became the owner, holder, and bearer of them all; and that until the commencement of the suit, the county had neglected

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and refused to pay the coupons on which suit was brought, though often requested so to do.

To this declaration the defendant pleaded four pleas:

1. That the plaintiff was not, at the time of filing his declaration, or at the time of entering the plea, the owner, holder, or bearer of the said alleged bonds and coupons, or of any or either of them, as in the declaration mentioned.

2. That at the time of filing the declaration and plea, the bonds and coupons were all the property of one Augustus Robins, a citizen of the state of Kentucky, and not then or now the property of any other person.

3. That although the legislature, by one act, empowered the county to subscribe to the stock of the company, and to borrow money to pay the subscription, yet the authority was coupled with a proviso that the real estate holders residing in the county should so vote, by a majority, at such times as the county court might appoint, and that "the question of subscribing stock, or of borrowing money to pay the same, never was submitted to the real estate holders residing in the county of Pendleton, to be determined by vote of a majority of them, as authorized and required by the act, before any stock had been subscribed by or for said county, or any money borrowed to pay the same." That subsequent acts of the legislature, passed before the subscription was made, which authorized a tax for the purpose of paying the subscriptions to the stock of the said company, also provided that before a subscription should be made and a tax levied, the question of levying the tax should be submitted to the voters of the county, and if a majority of the votes cast should be in favor of the tax, it should be levied, and the subscription should be made, and that the question whether the tax or the subscription

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thus authorized, or any tax for payment of a subscription of stock in said company, should be imposed, had never been submitted to or voted upon by the voters of the county in conformity with such acts; and that no other acts of the legislature authorized the county, or any one for it, to subscribe for stock in said company, or to levy a tax for payment, or to borrow money, or to issue bonds and coupons for the payment of any subscriptions in said company.

4. That the county did not sign, seal, or deliver the bonds and coupons to the railroad company, or to any person or corporation, as in the declaration alleged, nor authorize any one to do so; "and so the defendant says that the alleged acts and coupons are not its acts and deeds."

General demurrers to all these pleas were filed by the plaintiff, and were sustained, and judgment for the plaintiff entered thereupon. To review this judgment, the defendant prosecuted this writ of error.

B. H. Bristow, for the plaintiff in error.

J. W. Stevenson, for the defendant in error.

STRONG, J.—It must be admitted that the pleas interposed by the defendant in the court below were inartistically framed; that they were argumentative, and that they set up nothing which could not have been taken advantage of, for what it was worth, under the general issue. They might have been stricken from the record on motion, or, if special demurrers were allowable in that circuit they would have been condemned, had the plaintiff so demurred. But the demurrers were general, and the question before us is whether any of the pleas set up a substantial defense to the action. Now in regard to the first plea, while it is true that the defense which it sets up was only inferentially an answer to the plaintiff's complaint,

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and while it might as well have been set up under the general issue, it was nevertheless a traverse of a material averment of the declaration. The coupons were made payable to bearer, but if the plaintiff was neither the owner, nor the holder, nor the bearer, they were not promises to pay him, and the county was not indebted to him. Hence it was material to his case to aver, as he did, that he was the bearer, and the plea took issue with this averment. It denied the title of the plaintiff, or his right of action, and, though faulty in form, in substance it amounted to a defense. It was, therefore, error to overrule it upon a general demurrer.

Similar observations might be made respecting the demurrers to the second and fourth pleas.

The third plea was in effect a denial of any legislative authority to the county to subscribe to the stock of the railroad company, and to issue bonds for the payment of such subscription. The general demurrer to it raises the question whether it presented a substantial defense to the action.

It is to be noticed at the outset that the plea concedes legislative authority to the county to make a subscription, and to issue bonds in payment, though the exercise of the authority was required to be preceded by a popular vote. It concedes that the bonds were, in fact, made and issued. We say it concedes this, because such making and issue are alleged in the declaration, and the plea does not traverse the allegation. It concedes that the subscription was made; that the bonds were delivered to the company in payment; that they were sold for fifty thousand dollars; that the plaintiff subsequently became the owner, and hence that he stands in the position of a purchaser for value; and it concedes that the county obtained for the bonds a certificate of stock in the railroad company; which it now holds.

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Without legislative authority, a municipal corporation like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchase of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser, by proof that the county officers or the people have not done, or have insufficiently done, the things which the legislature required to be done before the authority to subscribe or to issue bonds should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. *Knox County v. Aspinwall*, 21 *How.* 539; *Bissell v. Jeffersonville*, 24 *Id.* 287; *Moran v. Commissioners*, 2 *Black*, 722; *Meyer v. Muscatine*, 1 *Wall.* 384; *Van Hostrup v. Madison City*, 1 *Id.*

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291; Supervisors v. Schenck, 5 *Id.* 772. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect *bona fide* purchasers against an attempt to set up non-compliance with the conditions attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value, that though the legislature empowered it to make them and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they can not; and, therefore, that the third plea can not be sustained. But, for the reasons given above, the case must be sent back for another trial; when, doubtless, the pleadings will be changed.

CHASE, Ch. J., and MILLER and FIELD, JJ., concurred; but said that they did not assent to all the views expressed in the preceding opinion.

Judgment reversed.

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THE PEOPLE OF THE STATE OF MICHIGAN
ex rel. LA GRANGE TOWNSHIP v. THE
TREASURER OF THE STATE OF
MICHIGAN.

24 Michigan, 468.

Supreme Court of Michigan; April Term, 1872.

Municipal corporations. Bonds. Mandamus. Where, after bonds of a municipal corporation have been issued and deposited with the treasurer of a state, for the purpose of aiding in the construction of a railway, under authority of a statute of the state, such statute is adjudged unconstitutional by the courts of the state, and the bonds themselves declared void, a proceeding by mandamus to compel the state treasurer to deliver up the bonds to the corporation issuing them should not be stayed because proceedings have been commenced by a stockholder of such railway corporation in a court of the United States to obtain the bonds for the railway company, alleging a refusal by the directors to take such proceedings, if the railway corporation could proceed only in a state court, and would not there be permitted to recover. Such proceedings by the stockholder are a mere evasion of jurisdiction, and it should not be assumed that they will be sanctioned by any court.

Municipal bonds, issued and deposited with the treasurer of a state, under a statute authorizing such issue and deposit for the purpose of aiding a railway company, are received by him in his official capacity; and where such statute is afterwards adjudged unconstitutional, and the bonds void, he is officially responsible for their safe keeping and return to the makers, when demanded.

If the return of the bonds, under such circumstances, is refused, upon a reasonable demand, mandamus is the proper proceeding to compel their return. It is the proper remedy for enforcing a specific legal right, for which there is no other adequate legal remedy, and is not excluded by other legal remedies which are not adequate to secure the specific relief needed, such as replevin; nor by the existence of a specific remedy in equity. A party will not be compelled to give up a legal remedy for an equitable one.

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Mandamus from the supreme court of Michigan.

This was an application for a writ of mandamus, on the relation of the township of La Grange, to compel the treasurer of the state of Michigan to deliver up and return to that township certain bonds issued by it and deposited with him, for the purpose of aiding the construction of the railroad of the Michigan Air Line Railroad Company, under statutes of the state which were afterwards judicially declared unconstitutional and invalid. The questions involved appear from the opinion.

Daniel Blackman, for the relator.

Ashley Pond and *Theodore Romeyn*, for the respondent.

CAMPBELL, J.—The relator having obtained an order on respondent to show cause why certain municipal bonds, deposited with him under the railroad aid laws, should not be delivered up, he returns that he has been served with a subpoena in a cause in equity, issued out of the circuit court of the United States for the eastern district of Michigan, under a bill filed by Joseph E. Young, of Chicago, Illinois, against respondent, relator, and the Michigan Air Line Railroad Company, to obtain the same bonds for the company.

And this return being demurred to, respondent relies on two principal grounds: *First*. That mandamus is not a proper remedy in such cases; and, *Second*. That the pendency of the chancery suit should stay it. The latter question is first in order of importance.

It is not claimed that the pendency of a suit like that referred to can in any way operate as a bar to

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these proceedings. There is no authority for any such doctrine, and all practice is against it. The only argument insisted on, is that in such cases comity requires that this court should await the final action in that suit,—or at least that such delay is proper and desirable, and should be granted as a matter of customary policy. To ascertain how far it would be proper to do this, each class of cases must be examined as it arises, and it is not possible that there can be any uniform rule on the subject. It must always be remembered that in considering such questions, it is not usually the court where action is had, but the parties who are taking it that must be regarded. Courts, except by appellate process, never interfere with each other's proceedings, and deal only with parties themselves.

When we look at the nature of the bill which has been filed in the United States circuit court, we find its purpose so clearly in violation of legal principles, as settled generally (and as emphatically by the United States supreme court as anywhere), that we can not hesitate to regard it as one over which the court where it is pending will not assume jurisdiction to grant relief. Its objects are not within the jurisdiction of any court of equity, as that jurisdiction has thus far been declared, and it is not very likely that any tribunal will entertain it.

We shall not consider any jurisdictional questions which depend on other than recognized and generally accepted grounds; and we shall abstain from deciding what effect might be due to the fact that it was filed in some haste, after notice of this application had been given to the railroad company, and before relators had put their papers on file here.

The bill is filed for the purpose of getting relief for a corporation created by virtue of the laws of Michigan. Complainant, although a stockholder, does not claim

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any immediate or personal right in or control over the property in controversy. He does not, and could not lawfully, seek to get possession of it. His bill rests upon the ground that it belongs to the corporation, which alone has a title and claim to it. Stockholders and creditors can only claim through the corporation itself.

It is not within the power of any court,—except in proceedings to divest the corporation of its charter franchises,—to take away the management of its affairs from the hands of the directors lawfully invested with that management, and give it into the hands of other managers. The corporate functions must be performed by corporate officers. The bill does not seek to divert this management of funds in possession, but it seeks to enforce a supposed corporate demand without the intervention of the directors.

It is perfectly evident from the whole structure of the bill (and it is only on this ground that any attempt can be made to sustain it at all) that the suit is really one in favor of the railroad company, and against the other defendants. It is as plainly a suit in their behalf as if brought in their name. That is the whole theory of the bill.

If the suit had been brought by the proper officers of the corporation, and in the corporate name, no jurisdiction could have existed except in one of the courts of the state of Michigan; because all the parties are domiciled here, and citizens and subjects of the state jurisdiction. And had the suit been brought here, there is no right involved which could lawfully invoke the appellate jurisdiction of the United States supreme court. There is no claim involved which could authorize any revision of a state decision.

In order to transfer into a court of the United States a controversy between Michigan citizens, under Michigan laws, some substantial ground must be

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presented which comes within some recognized rule of jurisdiction. Any merely colorable attempt would be a fraud which no court should tolerate or sanction, and in *Yawkey v. Richardson*, 9 *Mich.* 529, a judgment was reversed for a similar device in fraud of the courts of the United States.

The only ground relied on, is the one recognized in *Dodge v. Woolsey*, 18 *How.* 331, in which it was held, on the facts of the case, that a refusal by the directors of a company to prosecute a claim which they believed to be valid, and which was valid, and where there was no exercise of discretion properly involved, would justify a court in allowing a stockholder to file a bill on the ground that their conduct in not suing was fraudulent as against him, and in derogation of his rights and interests as a stockholder, which they had no right to abandon when they knew their duty.

The grounds on which that case was decided are fatal to this. The right there involved was one secured by the constitution of the United States, and settled by an unbroken course of decision from the Dartmouth College Case down. Although the corporation suit must have been brought in the state courts, by reason of the citizenship of the parties, yet the state decision, if against the right, was subject to review in the United States supreme court. The controversy was one which was necessarily of United States jurisdiction sooner or later, and it was a controversy directly arising under the constitution and laws of the United States.

The doctrine that the jurisdiction in favor of the stockholder does not exist, except as dependent on the culpable negligence of the directors, and that it can not exist at all except in an extreme case, is not only very clearly laid down in *Dodge v. Woolsey*, but it has never been relaxed. In *Memphis v. Dean*, 8 *Wall.* 64, NELSON, J., uses this language in deciding the cause, after speaking of the right referred to in the

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former case, where the stockholder is prejudiced by the refusal of the directors to sue: "This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company. There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join." And it was held in that case that failure to bring a superfluous suit would not be a ground of complaint, and would not support jurisdiction for relief.

In *Bronson v. La Crosse R. R. Co.*, 2 *Wall.* 283, the same judge, speaking for the court on the same subject, says: "The remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case, and for the sake of justice, and may be the only remedy to prevent a flagrant wrong." And in that case, as in the later one, the stockholders intervening were refused relief.

As the only claim involved in the controversy is to obtain possession of securities which, it is held by the state courts, the legislature could not under the constitution of the state legalize, any suit by the corporation in the state courts would necessarily have been nugatory; and to a knowledge of the law on this point all persons are holden. The corporation board would not have been bound, and would not have been authorized, to begin a suit that must of necessity be decided against them. The suit in the United States court could only be justified, under the decision in *Dodge v. Woolsey*, where the right was clear, and the remedy available. It is not legally possible for a refusal to

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sue, under these circumstances, to have been a violation of duty. And any attempt to transfer jurisdiction to other courts under such a pretext can not, therefore, be other than a legal subterfuge, which can not be recognized as a ground for delaying our action, and which we conceive is not in any way sanctioned by the decisions of the supreme court of the United States.

The remaining questions relate to the form of remedy. It is claimed that no such duty exists in the state treasurer as is usually enforced by the writ of *mandamus*, and that the remedy for a breach of the duty, if there be one, is in another form.

The first question that arises is whether any duty rests on the respondent, and if so, what it is.

He has, under color of official right, received in his official capacity certain bonds, which purport to be obligations of the complaining municipality. It is urged that if the aid law is invalid, the proceedings are all illegal, and his action is not official action. This is no other than an argument that all clearly illegal action by any public functionary must be regarded as unofficial action. In the case of *Osborn v. Bank of United States*, 9 *Wheat.* 738, the action of a state auditor under an invalid law was held, by reason of his official character, to create an aggravation of the grievance. In *Ryan v. Brown*, 18 *Mich.* 196, the entirely illegal action of a state officer was viewed in the same light as official misconduct. In *People v. Treadway*, 17 *Mich.* 480, the same argument was used, that unlawful acts were not official acts, and therefore not within the conditions of an official bond; but we held otherwise, as all courts have held. There can be no doubt that when a person undertakes to hold in his official custody that which has been placed there under a claim that it should be lawfully deposited in his custody, he is bound to restore it, on application of

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the proper party, if it does not belong to his custody. The public files and receptacles can not be changed into private ones by any legal theories. Their custodian can never cease to be a public officer in regard to any of them. Having received them as an officer he is bound to keep them safely, until demanded by their owners, and then he is equally bound to restore them. It is no defense to such a claim of restoration that the securities are not liable to be legally enforced. It is always possible that injury may be done to a person or municipality by being subjected to litigation, and instruments which purport to be obligations, and are legally invalid, may be compelled to be given up and canceled in all cases where any possible danger can be anticipated, where there is no rule of equity to the contrary. In these cases of municipal bonds, the townships can not be made to suffer for the legally wrongful action of their officers, and they have a right to recall the unauthorized securities. The duty of the treasurer is not discretionary. It is their absolute right to demand, and his absolute duty to surrender, what is held in the files of the office in their wrong. The duty is unconditional and it is clear.

We are then to consider whether a mandamus is the proper remedy for a refusal to comply with this duty.

It was urged on the argument that this writ will only lie where there is a positive statutory duty and an entire absence of any other remedy. And it is claimed that the decisions heretofore made sustain this view. We do not know of any such doctrine, and have never understood it to have been established in this state or elsewhere. In the frequent instances of application for this writ, the occasion has quite as often been to enforce duties not imposed by statute, as obligations which were statutory. There may very possibly be found isolated expressions, which, apart

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from their context and the occasion of their utterance, might favor one of the grounds claimed. Thus, in *People v. Judges of Branch Circuit Court*, 1 *Dougl. (Mich.)* 319, it was said there must be "no other remedy." In that case there was a better remedy in the ordinary course of law which reached all that could be desired. But in *People v. Judge of Wayne Circuit*, 19 *Mich.* 296, the doctrine was laid down more guardedly, that a relator must show "a clear legal right, and that there is no other *adequate* remedy." And in *People v. State Ins. Co.*, 19 *Mich.* 392, it was expressed more fully that the writ might issue for a specific duty where there is no other "specific and adequate remedy."

BLACKSTONE very clearly defines the jurisdiction in a few words. He says it lies "where the party hath a right to have any thing done, and hath no other specific means of compelling its performance." 3 *Bl. Com.* 110. In *Rex v. Windham*, *Cowp.* 377, Lord MANSFIELD adopts a statement of Mr. Kenyon, "that where there is no other legal specific remedy to attain the ends of justice, the course must be by mandamus, which is a prerogative writ." In *Rex v. Barker*, 3 *Burr.* 1265, he says: "Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject, and the advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a *right*, and *no other* specific remedy, this should not be denied." And in *Rex v. Vice-Chancellor of Cambridge*, 3 *Burr.* 1647, he says again: "This is the very reason of the courts issuing the prerogative writ of a mandamus; because there is no other specific remedy." The other judges were equally emphatic.

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For most rights, the ordinary legal remedies are ample to prevent a failure of justice, as upon private contracts a judgment for damages will usually suffice. But there are cases where, if contracts can not be enforced specially, there will be a failure of justice; and as the law can give no specific remedy in such cases, parties are compelled to resort to equity. If the law had the requisite machinery, no doubt it would so interfere as to render a resort to equity needless. And in all cases where it can enforce rights specifically, and no other relief is adequate, it certainly would be unjust not to do so. Unfortunately its powers are limited. But in cases where the right is clear and specific, and public officers or tribunals refuse to comply with their duty, a writ of mandamus issues for the very purpose, as declared by Lord MANSFIELD, of enforcing specific relief. It is the inadequacy, and not the mere absence, of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of this writ. Where none but specific relief will do justice, specific relief should be granted if practicable. And where a right is single and specific it usually is practicable.

The question then arises whether there is any other adequate, specific, legal remedy.

Courts of law do not, in deciding such questions, take into account remedies in equity. They may be regarded in determining the exercise of discretion in allowing the writ, but they can not affect the jurisdiction. There is no case where a court of law has its jurisdiction cut off by the existence of equitable remedies. The rule is the reverse,—that equity will not interfere if legal remedies are adequate. There is the strongest possible reason why a party should not be turned over to the tedious and dilatory process of a long suit, when there are no issues that need it. The only question that could arise in the class of cases now

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before us is, whether the bonds are in the possession of the respondent. If they are, the right to have them restored is a legal conclusion not open to question.

The same reasons would apply to render it improper to turn a party over to a suit in replevin, if there were not still more serious objections to it, as well as doubts of its applicability. The remedy would not only involve a needless legal contention, but it is not a proper or lawful thing to allow a sheriff, on such a writ, to intermeddle with public papers. The policy of the law requires them to be guarded by their official custodian, and it would be a monstrous abuse if the state offices could be exposed to the visitation of ministerial officers, who might be commanded by a writ, issued without the previous order or supervision of a court, to seize upon and deliver over to any one who should sue out the process, any document or muniment to be found there. Such a claim would be preposterous. A mandamus is the only admissible writ to command public officers to produce and give up papers in their custody.

The writ must be granted as prayed. And we trust it will not be necessary hereafter to interpose for the same purpose.

CHRISTIANCY, Ch. J., and COOLEY, J., concurred.

GRAVES, J., did not sit.

Mandamus granted.

People *ex rel.* Erie, &c. R. R. Co. v. Tubbs.

THE PEOPLE *ex rel.* THE ERIE & GENESEE
VALLEY RAILROAD COMPANY v. TUBBS.49 *New York*, 356.*Court of Appeals of New York; May Term, 1872.*

Location of route. The general railroad law of New York,—which provides that any person feeling aggrieved by the proposed location of a railroad, may apply for the appointment of commissioners to examine the proposed route, and to affirm or alter it, as may be consistent with the just rights of all parties and the public,—does not restrict the power of the commissioners over the proposed route to that part of it which lies within the bounds of the land of the party procuring their appointment. They may make any alteration of the proposed route, within the county, that may be necessary to obviate such objections of the party aggrieved as they may decide to be well founded. And it is their duty to complete the alteration so as to preserve the continuity of the line.

It seems, that the statute contemplates but one board of commissioners in each county; and the board so appointed should therefore complete its work, either by affirming the route proposed by the company, or by making all necessary alterations; and when this is done, the route through the county is established.

Appeal to the court of appeals of New York, from the general term of the supreme court in the fourth judicial department.

This was a certiorari to review a determination of the defendants, Tubbs and others, as commissioners appointed under the general railroad act of New York to examine the proposed route of the relator, the Erie & Genesee Valley Railroad Company.

The act mentioned (*N. Y. Laws* of 1850, ch. 140, § 32) requires every railroad company formed under it, to give notice of its proposed location in a prescribed manner, and allows any person aggrieved by the pro-

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posed location to apply for the appointment of commissioners to examine the route proposed, who shall affirm or alter it, as may be consistent with the just rights of all parties and the public. Under this act, George Hartman and William Hartman petitioned for the appointment of commissioners to examine the proposed location of the Erie & Genesee Valley Railroad Company in Livingston county, alleging that the location proposed needlessly injured the lands of the petitioners. The defendants were appointed commissioners, and, as such, made the following order:

"Now, therefore, by the authority vested in us by law, we hereby direct and determine that the location of said road through the premises of the said William Hartman and George Hartman shall be changed from the route as laid down on the map of the said company, on file in the clerk's office of Livingston county, to a line described as follows, to wit: The center line of the said road through the premises of the said William and George Hartman shall be laid in and correspond with a straight line joining the point of intersection of the center line of the Erie & Genesee Valley railroad (as located on their map on file) with the center line of highway running east and west, and known as the Zerfass road (said point of intersection being marked 'A' on the accompanying map) and the point of intersection of the center lines of Jefferson and Ossian streets, in the village of Dansville, said last point of intersection being marked 'B' on accompanying map."

The point last mentioned was some distance from the line of the road, and the order did not direct in what manner the route was to be continued from that point.

To review this decision of the respondents, the Erie & Genesee Valley Railroad Company brought this writ of certiorari, upon which the general term reversed the

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order. The respondents appealed from the judgment of the general term to the court of appeals.

Lester B. Faulkner, for the appellants.

John A. Van Derlip, for the respondents.

RAPALLO, J.—By section 22 of the general railroad law, every company formed thereunder is required, before constructing its road through any county, to file in the clerk's office a map of the route intended to be adopted in such county, and to give written notice of the route so designated to all actual occupants of the land over which it is to pass.

Any person feeling aggrieved by the proposed location may, within fifteen days after receiving such notice, apply for the appointment of commissioners. If appointed, it becomes their duty to examine the proposed route, and to affirm or alter it, as may be consistent with the just rights of all parties and the public. There is nothing in the statute which restricts the power of the commissioners over the proposed route to that part of it which lies within the bounds of the land of the party procuring their appointment. The effect of such a restriction would, except in very rare cases be either to deprive the commissioners of the power to change a location unnecessarily prejudicial to the objecting party, or to compel them, for the purpose of affording such remedy, to make curves which would be a serious injury to the line, and might render it dangerous or impracticable. No change, of any considerable extent, can be made in the line of a railroad at a particular point, without involving an alteration of the course to a greater or less distance in each direction; and the legislature has not been guilty of the absurdity of limiting the distance to which such necessary alterations may extend, by the boundaries of the

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land of the objecting party, or of making his right to relief depend upon the extent of the area of his land. When, upon the application of a person aggrieved by the proposed location, commissioners are appointed, they are required by the statute to examine and affirm or alter, not that part of the line which runs through the premises of the objector, which may be very limited in extent, but *the proposed route*. That clearly refers to the route referred to in the preceding part of the section, and of which a map is required to be filed, viz.: "the route intended to be adopted by such company in said county;" and empowers them to make any alteration of such route which may be necessary to obviate such objection of the party aggrieved as they may decide to be well founded. This point was determined in the Matter of the Long Island Railroad Company, 45 N. Y. 364.

It can not therefore be objected that, in the present case, the commissioners have exceeded their jurisdiction by making alterations extending beyond the boundaries of the lands of the petitioners. If duly appointed, they had jurisdiction to affirm or alter the proposed route as might be consistent with the just rights of all parties and the public. Their determination might be and was founded upon a personal examination of the route, and of the adjacent property, as well as upon testimony; and if upon knowledge thus acquired they had made an alteration of the proposed route, there would be no means of reviewing their decision upon the merits.

The real question presented on this appeal is whether the adjudication of the commissioners is in fact an alteration of the route. Cutting out and transplanting a portion of the line of the road, and leaving it disconnected at each end from any other portion of the road, would not be such an alteration of the route as is contemplated by the statute. Taken literally,

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this is what the decision of the commissioners purports to do. It changes the location of the road through the premises of William and George Hartman, from the route laid down on the map, so as to be "laid in and correspond with" a straight line running from the railroad at Zerfass street to the intersection of Jefferson and Ossian streets. It does not, in terms, connect either end of the piece of road so to be laid in and correspond with the straight line described, with the residue of the railroad; nor does it appear whether or not this straight line could be adopted as part of the line of the road. But assuming that the decision can be so interpreted as to embrace in the route of the road, as changed, the whole of this straight line from Zerfass to the intersection of Ossian and Jefferson streets, there the connection ends. The decision does not direct in what manner the road is to be continued beyond Ossian street. It makes the road terminate there. To thus abridge or interrupt the road was clearly beyond the power of the commissioners.

It is argued that the railroad company may themselves lay out and complete the line from the intersection of Jefferson and Ossian streets, so as to connect at some more southerly point with the residue of the road. But we do not think this an answer to the objection. In exercising the power to alter the proposed route through the county, it was the duty of the commissioners to complete the alteration so as to preserve the continuity of the line, and not merely to point a portion of the road in a particular direction, leaving the company to find their way back to the main line. The commissioners were so to alter the route "as might be consistent with the just rights of all parties and the public;" and for this purpose to examine the route and hear the parties. The whole alteration should be made by the commissioners, and their judgment should be exercised in respect to every

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part of it. We think that the statute contemplates but one board of commissioners in each county; and that all alterations to be made in the proposed route in such county shall be made by that board. There is no provision in the statute looking to the existence of more than one board, or providing for the determination of differences which might arise between several boards. When it should become necessary to alter a line it could hardly be expected that several independent boards would exactly coincide, or harmonize in their action; and if the statute contemplated that several bodies of this description should operate upon the line in the same county, it is reasonable to suppose that provision would have been made for reconciling differences between them. The absence of any such provisions tends strongly to show that the appointment of but one board of commissioners was intended to be authorized. The board so appointed should therefore complete its work, either by affirming the route proposed by the company or making all the necessary alterations; and when this is done, the route through the county is established. Any other construction would lead to endless confusion. In the present case, if the location by the commissioners of the portion of the line described in their decision were held sufficient, and the company should proceed to lay out a new line to connect the piece laid out by the commissioners with the residue of the road, any party deeming himself aggrieved by such new line might procure the appointment of another board of commissioners, and they might make such alterations as would necessitate a change in the line designated by the first commissioners; and this might happen as often as any board of commissioners should attempt an alteration incomplete in itself, and which the company should be obliged to complete on its own responsibility.

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We think, therefore, that the commissioners, if they undertook to make any alteration of the proposed route, should, after having afforded to all occupants of the land to be affected by the alteration, an opportunity to be heard, have completed the alteration so as not to break the continuity of the line, or to throw upon the company the responsibility of finishing the work which they, the commissioners, had begun. It was their duty, when causing the line of the road to diverge from the route laid out by the company, to provide a substituted route, consistent with the just rights of all parties and the public, and by which they would be bound. And for the failure of the commissioners thus to complete the performance of the duty imposed upon them by the statute, the judgment of the general term, reversing their decision, should be affirmed.

CHURCH, Ch. J., did not vote.

Others concurred.

Judgment affirmed.

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DAVIS v. GRAY.

16 Wallace, 208.

*Supreme Court of the United States; December Term,
1872.*

Lands. Grants. Receivers. A suit by a receiver of a railroad company, to restrain officers of a state from granting away lands previously granted to the company, may be sustained in a circuit court of the United States, under the general equity jurisdiction of the national courts, and without reliance upon any statute of the state authorizing such suits by receivers.

Such a suit may be maintained in a United States circuit court against the governor or other public officers of a state, who appropriately represent the state in regard to the interests involved in the controversy, if, according to the jurisprudence of the state, similar suits could be sustained in the courts of the state.

Where a large grant of lands has been made to a railroad corporation by a state, defeasible if certain conditions are not performed within a certain time by the company, and the subsequent secession of the state and war ensuing render the fulfillment of the conditions by the company impossible, from the action of the state itself, the conditions are abrogated at law; but in equity, performance of the conditions, within a reasonable time after the disability ceases, may be imposed.

The franchise and land grant and land reservation granted to a particular railroad company in its charter by the state of Texas,—*Held*, not forfeited by the failure of the company to comply with certain conditions in its charter, in view of the secession of the state, and the existence of rebellion, and of several statutes of the state condoning the non-compliance with such conditions: and provisions of the constitution of Texas of 1869 (arts. V., VII.), which assume to make a different disposition of the land granted,—*Held*, void, as violating the contract obligations of the charter.

Appeal to the supreme court of the United States from the circuit court for the western district of Texas.

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This was a suit in equity by Gray, a citizen of New York, receiver of the Memphis, El Paso, & Pacific Railroad Company, against Davis, governor of the state of Texas, and Keuchler, commissioner of the general land office of that state, to restrain the defendants from issuing patents, in the name of the state, for certain lands alleged to have been granted by the state to the railroad company, by its charter.

From the bill it appeared that the Memphis, El Paso, & Pacific Railroad Company was incorporated by the state of Texas by an act passed February 4, 1856, for the purpose of building a railroad across the state, from its eastern boundary to El Paso. The act of incorporation granted to the company, from the public lands of the state, sixteen sections for each mile of the road; certificates for eight sections per mile to be issued on the grading of successive lengths of the road, and eight more per mile upon the complete construction of the same; and a reservation was granted of the alternate or odd sections of land for eight miles on each side of the road, within which the company should have an exclusive right to locate its certificates; while it also had the privilege to locate said certificates on any other unappropriated public lands.

This reservation was of the greatest value, as it enabled the company to reap the advantage of the enhancement of price which the construction of the road would cause in the lands along the line.

In the same year (1856) the company was organized in reliance on the grants, and especially on the reservation, and duly accepted the same.

There were certain conditions precedent to the vesting of the charter, land grant, and reservation; but they were all complied with, and at a cost to the company for surveys of over one hundred thousand dollars. These and subsequent surveys resulted, for

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the company, in the official designation of the road line and the center line of the reservation for some eight hundred miles, and the "sectionizing" and numbering of the odd sections of land in the reservation, in a belt of country some two hundred and fifty miles in length and sixteen in width; and for the state, in the surveying and mapping of the same belt of country, and the "sectionizing" and numbering of the alternate or even sections for the benefit of the state. The company also graded some sixty-five miles of the road, and was interrupted in the work of construction by the rebellion and so-called "secession" of the state; but resumed work after the war, and graded between twenty and thirty miles further.

There were certain conditions subsequently annexed to the charter, viz.: that if the company should not have completely graded not less than fifty miles of its road by March 1, 1861, and at least fifty miles additional thereto within two years thereafter, then its charter should be null and void. The first fifty miles were graded within the required time; the second fifty miles had not been graded. Within two years after the performance of the first condition, however, the legislature of Texas, by an act "for the relief of railroad companies," approved February 11, 1862, enacted, that the failure of any chartered railroad company to complete any section, or fraction of a section, of its road as required by existing laws, should not operate as a forfeiture of its charter, or of the lands to which said company would be entitled under the provisions of an act entitled "An act to encourage the construction of railroads in Texas by donation of land," approved January 30, 1854; provided that the said company should complete such section, or fraction of a section, as would entitle it to donations of land, under existing laws, within two years after the close of the war between the Confederate States and

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the United States of America. Within the two years after the close of the war, the provisional legislature, by act of November 13, 1866, enacted, "that the grant of sixteen sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this act;" and article XII., section 33, of the constitution of Texas of 1869, while declaring that the legislatures which sat from March 18, 1861, to August 6, 1866, were without constitutional authority, yet enacted that such declaration should not affect, prejudicially, private rights which had grown up under such acts, and that though the legislature of 1866 was only provisional, its acts were to be respected, so far as they were not in violation of the constitution and laws of the United States.

By act of July 27, 1870, the Southern Transcontinental Railroad Company was incorporated, and it was enacted, in terms, that it might "purchase the rights, franchises, and property of the Memphis, El Paso, & Pacific Railroad Company, heretofore incorporated by the state."

The land grant was limited to fifteen years from February 4, 1856, but this time had not yet expired, and by the act of November 13, 1866, for the benefit of railroad companies, it was enacted, that this grant of sixteen sections of land to the mile to railroad companies theretofore or thereafter constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of this act.

The land reservation was conditioned upon certain surveys: 1. It was to be surveyed from the eastern boundary of Texas, as far as the Brazos River, within four years from March 1, 1856. 2. The center line of

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the reserve was to be run and plainly designated from the Brazos to the Colorado within fifteen months from February 10, 1858. 3. The whole reservation was to be surveyed within ten years from February 10, 1858. 4. The company was to have a connection with some road leading to the Mississippi River or the Gulf of Mexico, within ten years from February 10, 1858. The first and second of these conditions were fulfilled within the times limited. The legislature, by act approved January 11, 1862, enacted that "the time of the continuance of the present war between the Confederate States and the United States of America shall not be computed against any internal improvement company in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to do."

This act, it was claimed by the company, extended the time for the performance of the third and fourth conditions till June 10, 1873.

In the years 1867 and 1868 the company executed two series of bonds, known as land grant bonds, amounting in the aggregate to the par value of ten million dollars in gold, and also executed and delivered to one Forbes and others, as trustees, two mortgages to secure said bonds, by one of which they mortgaged all lands actually acquired or thereafter to be acquired by said company by grading, constructing, and equipping the first one hundred and fifty miles of the road of said company, and by the other of which they mortgaged the like property for the second one hundred and fifty miles. Of these bonds five million three hundred and forty-three thousand seven hundred dollars were sold for value, mostly in small lots. The grants, guarantees, and assurances by the state of Texas to the said company of the said franchises, and especially of said land grant and land reservation, were recited in said mortgages, and were also

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announced and repeated to the purchasers personally, and by advertisement and prospectus, and the purchasers took the bonds relying on said grants, and upon the exclusive right of the company to locate certificates within the territory so reserved.

The bonds not being paid, the circuit court of the United States for the western district of Texas, on motion of Forbes, trustee under the mortgage, on July 6, 1870, enjoined the railroad company from disposing of any of its effects, and put the road into the hands of one John A. C. Gray, the complainant in this suit, as receiver, with authority "to take possession of the moneys and assets, real and personal; roadbed, road, and all property, whatsoever, of the said Memphis, El Paso, & Pacific Railroad Company, wheresoever the same may be found, with power under the special order of the court, from time to time to be made, to manage, control, and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer, and convey the road, roadbed, and other property of said company, as an entire thing," &c.

On January 20, 1871, it was further ordered by the court: "That the said John A. C. Gray, receiver, as aforesaid, be, and he is hereby, authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso, & Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said company, or in the name of said receiver, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company and of the said receiver, and for secur-

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ing and protecting the land grant and land reservation of the said company."

In November, 1869, a new state constitution was adopted, and was approved by Congress, the fifth and seventh sections of which are as follows:

"SECTION 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

"SECTION 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charters respectively, and the laws of the state under which the grants were made, are hereby declared forfeited to the state for the benefit of the school fund."

The constitutional convention which framed this constitution passed an ordinance to the effect that all heads of families actually settled on vacant lands lying within the Memphis and El Paso railroad reserve, shall be entitled to and receive from the state eighty acres of land, including the place occupied, on payment of all expenses of survey and patent; and that all vacant lands lying within said reserve are declared open and subject to sale to heads of families actually settled on or who may actually settle on said reserve, at the price of one dollar per acre; and that said vacant lands within said reserve shall be open to pre-emption settlers, and subject to the location of all genuine land certificates.

There were in 1869, and were on January 20, 1871, when Gray was ordered by the court to bring such suits in the name of the company as he might be advised by counsel were necessary and proper in the discharge of the duties of his office, a great number of land certificates outstanding and unlocated in Texas. Since the passing of the ordinance referred to, and the adoption of the constitution of 1869, many hundreds

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of the holders of certificates other than those issued to the company, had located their certificates on the sections reserved to the company, had returned their surveys and locations to the commissioner of the general land office, and had applied for patents on the same. Before September 19, 1870, the defendant Kuechler, as commissioner of the general land office of the state, and the defendant Davis, as governor, professing to act under the constitutional provisions cited above, issued two such patents. On September 19, 1870, the receiver filed a protest with the commissioner against issuing any further patents for lands reserved to the company, but the defendants disregarded the protest, and issued thirty-two additional patents within the reserve; the whole of the land thus patented amounting to nearly twenty thousand acres; and thereupon, on January 20, 1871, Gray filed this bill in the court below. The bill, after averring the incorporation of the Memphis, El Paso, & Pacific Railroad Company, under the statutes referred to, and the performance of all acts and things necessary to the full and complete vesting, securing, and preserving of the franchises, rights, and privileges granted thereby, and stating the facts above given, averred that the company was insolvent, and could not continue the construction of the road, and that the holders of said bonds would necessarily be remitted to the security of the mortgages; that the said security was worthless unless the receiver, under order of court, should be able to sell the franchises and property of said company to some party or parties who, by constructing the road, should acquire the lands referred to in the mortgages, and hold the same subject to the lien of them. It averred that the general laws of Texas authorized to the fullest extent the conveyance of the franchises of a railway company by sale under execution or foreclosure; and that by act of July 27,

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1870, the Southern Transcontinental Railroad Company was created, and, as before mentioned, was expressly authorized by its charter to "purchase the rights, franchises, and property of the Memphis, El Paso, & Pacific Railroad Company, heretofore incorporated by the state;" that the Southern Transcontinental Company stood ready to do this, and to devote the lands to be acquired by the exercise of said Memphis and El Paso franchises to the settlement of the land grant mortgage debt, provided the receiver could convey the charter, the land grant, and the grant of the land reservation unimpaired and in full force.

The bill further alleged that the receiver, on negotiating for a transfer of the franchises of the company, found that the market for them was peculiar, in the following respects: it was limited, as the franchises were only of use or value to those who desired and were able to construct the road; it depended in great measure upon the reputation of and confidence in the enterprise, and a belief among capitalists, outside of the state of Texas, that the state could and would have to abide by the grants contained in the charter; that it depended peculiarly and essentially upon the preservation of the land grant and land reservation, inasmuch as the country through which the road was to be built was sparsely inhabited, without cities or towns to furnish local traffic; that Texas lands, at a distance from railroads, were of but nominal value compared with lands along the line of the roads, and that the Southern Transcontinental Railroad Company, to whom the receiver chiefly looked as a purchaser, already had the right of way across the state and parallel with the route of the Memphis & El Paso charter, following "as near as might be practicable the old survey of the Memphis & El Paso road;" making the mere right of way of the latter of comparatively little value without the lands and the reservation

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The bill also alleged that the acts of the defendants in executing and causing to issue patents for the reserve, were, and their continuance would be, irretrievable destruction of that portion of the franchise of the company which consisted of the right to have the odd sections of the reservation devoted exclusively to the location and patenting of the company's certificates, would destroy all confidence in the other grants of the company, as well as in the grant of the reservation, and render the franchise of the company valueless in the hands of the receiver, doing irreparable injury to the interests committed to his charge; and that the Southern Transcontinental Company asserted and insisted to the receiver, that unless the said acts were judicially declared unlawful, and perpetually restrained, the said franchises would be valueless to them, and that they would not carry out the purchase of the same.

The bill asserted that the charter of the company was a contract between the state and the company, which contract was now in the hands of the complainant as receiver, and under direction of a court of equity, to be used for the benefit of the creditors of the company; that the said provisions of the constitution of Texas and the said ordinance of convention impaired the obligation and value of the said contract, and also of the said contracts of mortgage, and were in so far contrary to article I., section 10, of the Constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts," and were in so far null and void; and that the acts of the governor of the state and commissioner of the land office, in issuing such patents, were without authority of law, and illegal, and that any repetition of the same should be perpetually restrained. The bill prayed an injunction accordingly.

An amendment to the bill showed, as a reason for

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confining the bill to the two defendants named, that the complainant had applied at the general land office of Texas, to have the number and names of the parties who had located land certificates other than those issued to the Memphis, El Paso, & Pacific Railroad Company, on lands within and forming a part of the land reservation of the said company, and to obtain a list of the same; that he had been informed on making such application, and by the defendant, Kuechler, that the number of the same was very great, to wit: many hundreds, and that a list could not be furnished without great time and labor. The amendment further alleged that parties were constantly making locations and surveys of land certificates as aforesaid on the lands of said reservation; and that parties who had made such locations and surveys had a certain time allowed them by law, after making the same, before they were required to make returns thereof to the commissioner of the general land office, and that the complainant was consequently unable, and never would be able, to obtain a correct list of such parties.

To this bill the defendants demurred:

1. Because it did not appear from it that the defendants, or either of them, had any direct or personal interest in the lands which were the subject-matters of this suit; but on the contrary that they were sued in their official capacities only; and that the lands were a part of the public domain of the state of Texas, which was not and could not be made a party to this suit.

2. Because it did not appear that while under amendment 11 to the Constitution of the United States the court could have no jurisdiction as between the complainant and the state of Texas, jurisdiction existed in a suit against two of the officers of said state in their official capacity alone, to decree portions

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of the constitution of the state, which had been accepted by the Congress of the United States, and which the defendants were sworn to obey, void.

3. Because it did not appear that the bill was founded on fraud, accident, mistake, trust, specific performance, or any ground of equity jurisdiction; or that the same set out any equity against the defendants whatever; on the contrary, it appeared that the bill was brought to have sections 5 and 7 of article X. of the constitution of the state of Texas decreed void.

4. Because it did not appear that the complainant, being an officer of the court, had a right to sue the defendants therein, nor that the court could have jurisdiction as between the complainant, though a citizen of the state of New York, and the defendants, as citizens of the state of Texas, in either their respective official or individual capacities.

5. Because the "act incorporating the Memphis, El Paso, & Pacific Railroad Company," and the other acts referred to in the bill, did not amount to a contract between the state of Texas and the company.

6. Because it did not appear that any designated third person or persons was or were about to have a patent granted him or them by the defendants, and that such third person or persons was or were sought to be made a party or parties, nor that said bill was not too vague and indefinite.

7. Because it did not appear that the creditors not specified of the company were made parties thereto, nor that the persons not specified applying for patents on locations of certificates, within the limits of the lands that were reserved, were made parties thereto; all of whom, according to the bill, had equities that ought to be determined in this suit, and hence were necessary and proper parties to this suit.

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8. Because it did not appear that the complainant had any equities that he was not bound to have litigated against such third persons not specified, and also against those not specified who had located certificates within the limits of the lands that were reserved, before he would have a right (which was not conceded) to invoke any action by means of a bill in a court of equity, in case such a court might have jurisdiction.

This demurrer was overruled. No answer being filed, a decree *pro confesso* was taken for the complainant, and a final decree granted in accordance with the prayer of the bill, to the following effect:

"That in July, 1870, and at the time of the appointment of Gray as receiver, and at the date of the decree, the company was duly possessed of the franchise and right of and to the land grant and land reservation of the company; that the said right and the franchise of the company were unimpaired, and in full force and virtue; that the provisions of the constitution of Texas, and of said ordinance of convention, so far as they impaired or purported to impair the said charter, land grant, or land reservation, were contrary to the provisions of article I., section 10, of the Constitution of the United States, and were, in so far, null and void; and that the defendants should be perpetually enjoined from issuing, or causing or permitting to issue, any patent of the lands of the odd sections of said reservation, except on the certificates granted to the company, or its assigns."

From this decree the defendants appealed.

T. J. Durant and *G. F. Moore*, for the appellants.

B. R. Curtis, *J. A. Davenport*, and *C. Parker*, for the appellees.

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SWAYNE, J.—This is an appeal in equity from the decree of the circuit court of the United States for the western district of Texas. The appellee was the complainant in the court below. The defendants demurred to the bill. The demurrer was overruled. The defendants stood by it. A decree as prayed for was thereupon rendered *pro confesso* for the complainant. The defendants removed the case to this court by appeal, and it is now before us, as it was before the court below, upon the demurrer to the bill. This brings the whole case as made by the bill under review. The facts averred, so far as they are material, are to be taken as admitted and true. We shall refer to them accordingly. The question presented for our determination is, whether the circuit court erred in overruling the demurrer. The appellants, having elected not to answer, the decree for the complainant followed as of course.

At the outset of our examination of the case, we are met by jurisdictional objections as to the parties—both complainant and defendants—which, before proceeding further, must be disposed of. We will consider first, those which relate to the complainant, and then, those with respect to the defendants.

The complainant was appointed to his office of receiver, in the suit in equity of Forbes v. Memphis, El Paso, & Pacific Railroad Company, a corporation created by the state of Texas. The suit was in the same court whence this appeal was taken. In that case, on July 6, 1870, it was, among other things, ordered and decreed that the corporation should be enjoined from disposing of any of its effects, and that John A. C. Gray, the complainant in this suit, should be, and he was thereby, “appointed receiver; to take possession of the moneys and assets, real and personal; roadbed, road, and all property whatsoever, of the said Memphis, El Paso, & Pacific Railroad Company,

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wheresoever the same may be found, with power under the special order of the court, from time to time to be made, to manage, control, and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer, and convey the road, roadbed, and other property of said company, as an entire thing," &c.

On January 20, 1871, it was further ordered by the court "that the said John A. C. Gray, receiver as aforesaid, be, and he is hereby, authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso, & Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said company, or in the name of said receiver, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company and of the said receiver, and for securing and protecting the land grant and land reservation of the said company."

It is to be presumed the receiver filed this bill, as it is framed in accordance with the advice of counsel. *Bank of the United States v. Dandridge*, 12 *Wheat.* 70.

The authority given by the decree is ample. Still the question arises whether it was competent for him to proceed in his own name instead of the name of the company whose rights he seeks by this bill to assert. A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative

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of the court, and of all the parties in interest in the litigation wherein he is appointed. *Jer. Eq.* 249; *Davis v. Duke of Marlborough*, 2 *Swans.* 125; *Shakel v. Duke of Marlborough*, 4 *Madd.* 463. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. *Wyatt Pr. Reg.* 355. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodia legis*. *Re Colvin*, 3 *Md. Ch. Dec.* 278; *Delany v. Mansfield*, 1 *Hogan*, 234. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. *Chautauqua County Bank v. White*, 6 *Barb. (N. Y.)* 589; *Verplanck v. Mercantile Ins. Co.*, 2 *Paige (N. Y.)* 452. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. *De Groot v. Jay*, 30 *Barb. (N. Y.)* 483; *Angel v. Smith*, 9 *Ves.* 335; *Russell v. E. A. R. R. Co.*, 3 *Mac. & Gor.* 104; *Parker v. Browning*, 8 *Paige (N. Y.)* 388; *Noe v. Gibson*, 7 *Id.* 513; 2 *Story Eq.* § 833, A. & B. The same rules are applied to the possession of a sequestrator. 2 *Dan. Ch. Pr.* 1433. Where property in the hands of the receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise, as the court in its discretion may see fit to direct. *Empringham v. Short*, 3 *Hare*, 470. Where property, in the possession of a third person, is claimed by the receiver, the complainant

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must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way. *Parker v. Browning*, 8 *Faige* (N. Y.) 388; *Noe v. Gibson*, 7 *Id.* 513; 2 *Story Eq. supra*; 2 *J. & W.* 176; 2 *Dan. Ch. Pr.* 1433. After tenants have attorned to the receiver, he may distrain for rent in arrear in his own name. 2 *Dan. Ch. Pr.* 1437. In a suit between partners he may be required to carry on the business, in order to preserve the good-will of the establishment, until a sale can be effected. *Marten v. Van Schaick*, 4 *Paige* (N. Y.) 479.

Here the property in question is not in the possession of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession; and there is no question in the case relating to that subject. But the order of the court expressly requires the receiver to secure and protect "the assets, franchises, and rights," and "the land grant and reservation of said company." He is seeking to perform that duty by enjoining the appellants from doing illegal acts, which the bill alleges. If done, would render the rights and title of the company to the immense property last mentioned, of greatly diminished value, if not wholly worthless.

We think it is competent for him to perform this function in the mode he has adopted. The decree, in the case wherein he was appointed, expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority in the regular exercise of its jurisdiction. No appeal has been taken, and the order stands unreversed.

This bill is auxiliary to the original suit. *Freeman v. Howe*, 24 *How.* 451; *Jones v. Andrews*, 10 *Wall.* 327. It is analogous to a petition by a receiver to the court to protect his possession from disturbance, or the property in his charge from threatened injury or destruction. No title in the receiver is necessary to

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warrant such an application, or the administration by the court of the proper remedy. There can be no valid objection to the receiver here, in analogy to that proceeding, maintaining this suit. In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the states they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation, without its aid.

A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

In *Osborn v. Bank of the United States*, 9 *Wheat.* 738, three things, among others, were decided :

1. A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant.

2. Where the state is concerned, the state should be made a party, if it could be done. That it can not be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state, in all respects as if the state were a party to the record.

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3. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

Dodge v. Woolsey, 18 *How.* 331; *State Bank v. Knoop*, 16 *Id.* 369; *Jefferson Branch Bank v. Skelly*, 1 *Black*, 436; *Ohio Life, &c. Co. v. Debolt*, 16 *How.* 432; and *Mechanics', &c. Bank v. Debolt*, 18 *Id.* 380, proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant.

In *Woodruff v. Trapnall*, 10 *How.* 190, a writ of mandamus was issued to the proper representative of the state of Arkansas to compel him to receive the paper of the Bank of the State of Arkansas in payment of a judgment which the state had recovered against the relator. The bank was wholly owned by the state, and the claim was made under a clause in the charter which had been repealed. Judgment was given against the respondent. The question of jurisdiction does not appear to have been raised. In *Curran v. Arkansas Bank of the State of Arkansas*, and others, 15 *How.* 304, it appeared that the bank had become insolvent. A creditor's bill was filed to reach its assets. The objection was taken that the state could not be sued. This court answered that the objection involved a question of local law, and that as the state permitted herself to be sued in her own tribunals, that was conclusive upon the subject. According to the jurisprudence of Texas, suits like this can be maintained against the public officers who

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appropriately represent her touching the interests involved in the controversy. *Ward v. Townsend*, 2 *Tex.* 581; *Cohen v. Smith*, 3 *Id.* 51; *Commissioner General Land Office v. Smith*, 5 *Id.* 471; *McLelland v. Shaw*, 15 *Id.* 319; *Stewart v. Crosby*, *Id.* 547. In the application of this principle there is no difference between the governor of a state and officers of a state of lower grades. In this respect they are upon a footing of equality. *Whitman v. Governor*, 5 *Ohio St.* 528; *Houston, &c. R. R. Co. v. Kuechler*, Supreme Court of Texas—not yet reported.

A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights. *Ex parte McNiel*, 13 *Wall.* 236. Upon the grounds of the jurisprudence of both the United States and of Texas we hold this bill well brought as regards the defendants.

It is insisted that the corporation, on behalf of which this suit was instituted, has ceased to exist.

The bill avers that "The Memphis, El Paso, & Pacific Railroad Company" . . . is "a corporation created by and existing under certain statutes of the state of Texas hereinafter set forth," and that within the times limited by the charter and extended by other acts the company "did all acts and things necessary to the full and complete vesting, securing, and preserving of the franchises, rights, and privileges granted thereby." The demurrer admits the truth of these averments unless they are inconsistent with the statutes which bear upon the subject. The corporation

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was created by an act of the legislature of Texas, approved February 4, 1856. By section 1 certain parties are named and created a body politic and corporate, and the general powers inherent in all such bodies are formally given. Section 2 gives the right to construct a railway, commencing on the eastern boundary of the state, between Sulphur Fork and Red River, at the western terminus of the Mississippi, Ouachita, & Red River Railroad, or of the Cairo & Fulton Railroad, and running thence westerly to the Rio Grande, opposite to or near the town of El Paso.

Section 20 declares that no rights shall vest under the charter until a certain amount of stock therein named shall have been subscribed, and the percentage prescribed shall have been paid upon it. This requirement is covered by the averment in the bill that the company had done everything necessary to secure the vesting of all the franchises given to it. We do not understand that there is any controversy on this subject. All the other conditions prescribed, involving the existence of the corporation, are clearly subsequent. They are found in section 14 of the charter, in section 1 of the act of February 5, 1856, and in section 3 of the act of February 10, 1858. To any argument drawn from these provisions there are two conclusive answers:

1. There has been no judgment of ouster and dissolution. Without this they are inoperative. To make them effectual they must be grasped and wielded by the proper judicial action. See *Ang. & A. on Corp.* § 777, and the authorities there cited.

2. The offenses and punishment denounced have been condoned and waived by the subsequent action of the legislature. The act of March 20, 1861; the act for the relief of railroad companies, approved January 11, 1862; the act for the relief of companies incorporated for purposes of internal improvement, ap-

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proved February 18, 1862 ; and section 3 of the " Act to incorporate the Transcontinental Railroad Company," of July 27, 1870, each and all have that effect. The section last mentioned authorizes the company therein named to " purchase the rights, franchises, and property of the Memphis, El Paso, & Pacific Railroad Company, heretofore incorporated by this state." This is a clear affirmation, by implication, of the existence of the corporation, and of the possession of the rights, franchises, and property conferred by its charter. What is implied is as effectual as what is expressed. *United States v. Babbit*, 1 *Black*, 57. These considerations are so clearly conclusive, that it is needless to advert more particularly in this connection to the legislation in question, or to pursue the subject further. There is no warrant for the proposition that the corporation had ceased to exist.

The heart of this litigation lies in the immense land grant which is in controversy between the parties. The objections we have considered are only outworks thrown up to prevent the conflict from reaching that point. It is insisted that the rights of the company touching the entire reservation have become forfeited.

Section 15 of the charter provides as follows : " All the vacant lands within eight miles on each side of the extension line of said road, shall be exempt from location or entry, from and after the time when such line shall be designated by survey, recognition, or other wise. The lands hereby reserved shall be surveyed by said company at their expense, and the alternate or even sections reserved for the use of the state. And it shall be the duty of said company to furnish the district surveyor of each district through which said roadway runs, with a map of the track of said road, together with such field-notes as may be necessary to the proper understanding and designation of the same."

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There are other provisions prescribing various details not necessary to be particularly stated or considered.

A proviso in section 17 declares that no title shall be permanently vested in the company or their assigns for land granted for the grading as contemplated by the act, until twenty-five miles of the road shall have been completed and put in running order. The proviso in section 20 of the charter, that no rights shall vest under it until the condition therein prescribed is complied with, has already been considered. Conditions of forfeiture of the lands granted are prescribed in this and subsequent acts. They are found in section 14 of this act; in sections 1 and 4 of the supplemental act of the same date; and in sections 3 and 4 of the act of February 10, 1858. These conditions will be considered hereafter.

The act for the relief of internal improvement companies of January 18, 1862, declared that the time of the continuance of the war between the Confederate States and the United States should not be computed against any internal improvement company in reckoning the period allowed them for the completion of any work they had contracted to do.

The act of January 11, 1862, for the relief of railroad companies, enacted that the failure of any chartered railroad company of the state to complete any part of its road, as required by existing laws, should not operate as a forfeiture of its charter or of the lands to which the company would be entitled, under the provisions of the act entitled "An act to encourage the construction of railroads in Texas by donations of land," approved January 30, 1854, and the several acts supplementary thereto, provided the company should complete such portion of its road as would entitle it to donations of land under existing laws within two years from the close of the war.

The act for the benefit of railroad companies of

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November 13, 1866, declared that the grant of sixteen sections of land to the mile to railroad companies theretofore or thereafter constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of the act. These several acts are valid. See Texas Const. of 1869, § 33; Texas v. White, 7 Wall. 700.

By an act approved July 27, 1870, the Southern Transcontinental Railroad Company was incorporated.

It was declared that the object of the company thus created was to construct and establish a railway line and telegraphic communication from the eastern boundary of the state of Texas, "and thence as near as practicable to the route of the Memphis, El Paso, & Pacific Railroad Company, to, or near, the town of El Paso." It was enacted that "the main line of said road shall follow, as near as may be practicable, the old survey of the Memphis & El Paso road." It was further enacted that "the said company, hereby incorporated, may purchase the rights, franchises, and property of the Memphis, El Paso, & Pacific Railroad Company, heretofore incorporated by this state," as before mentioned.

Section 1 of the ordinance of 1869 declared that all heads of families settled on vacant lands lying within the Memphis & El Paso Railroad reserve, should be entitled to receive from the state of Texas eighty acres of land, including the place occupied, upon payment of the expenses of survey and patent.

By section 2 it was declared that all the vacant land within the reserve was open to sale to settlers and pre-emption settlers, and subject to the location of land certificates. Section 3 declared that the company had forfeited its right to the land, and that certain certificates having been issued to the company and

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patents issued thereon, it was made the duty of the attorney-general to institute legal proceedings to have such certificates and patents canceled.

In November, 1869, the present constitution of Texas was adopted. It was subsequently approved by Congress.

Sections 5 and 7 of this constitution are as follows :

"SECTION 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

"SECTION 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charter respectively, and the laws of the state under which the grants were made, are hereby declared forfeited to the state for the benefit of the school fund."

This summary gives a view of the statutory and constitutional provisions necessary to be considered in disposing of the question before us.

On June 20, 1857, the company filed in the land office at Austin surveys showing the line of the road from the eastern boundary of the state to El Paso, which line was officially recognized by the commissioner of the general land office of Texas. By March 1, 1860, the company had surveyed, sectionized, and numbered all the sections and fractional sections of the vacant lands within the reservation, from the eastern boundary of the state to the crossing of the Brazos, of which due returns were made to the commissioner, and by him accepted. By May 10, 1859, the company had marked and designated the central line of the road from the Brazos to the Colorado, and made proper returns to the office of the commissioner, by whom they were accepted. The lands granted to the company thereby became defined and officially recognized as such along the whole extent of their line.

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In doing this work the company surveyed, numbered, and mapped each alternate or even section of public lands for two hundred and fifty miles in length, and sixteen miles in width, in behalf of the state of Texas. It was of great benefit to her, and is reported to the receiver to have cost the company more than one hundred thousand dollars.

By consent of parties the bill was amended *nunc pro tunc* in three particulars. The complainant admitted that no land within the reserve had been surveyed, sectionized, or numbered west of the Brazos River, and that no work had been done on the road before or since 1861, except as averred in the bill. He averred that he applied to the general land office for the number and names of those who had located certificates other than such as were issued to the company upon lands within the reservation, and that Keuchler, the defendant, answered that the number was very great, amounting to hundreds, and that a list could not be furnished without great time and labor. He averred further that parties were constantly locating certificates and making surveys within the reservation, and that they were allowed a specified time to make their returns, so that it was impossible for him to obtain a full list of such parties.

The company commenced work within one year from March 1, 1856, and before March 1, 1861, had completely graded more than fifty miles of its roadway, beginning at the eastern boundary line of the state and extending west in the direction of El Paso. Act of February 10, 1858, § 3.

We do not understand that up to that time there was a breach of any condition touching the existence of the corporation or its right to the lands within the reservation. Before that time the tracts east of the Brazos covered by the grant were definitely fixed by the surveys which the company had made. The title

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of the company to those west of the Brazos, though the sections were not designated, was equally valid. The good will of a lease which the landlord is in the habit of renewing is property, and rights growing out of it, whether by contract or otherwise, will be protected and enforced by a court of equity. *Phyfe v. Wardell*, 5 *Paige* (N. Y.) 268; *Amour v. Alexander*, 10 *Id.* 571.

The rights of the company west of the Brazos were of a much more substantial character than those which were the subjects of judicial action in the cases cited.

The real estate of a corporation is a distinct thing from its franchises. But the right to acquire and sell real estate is a franchise, and the right to acquire the particular real estate designated in the charter of this company, and here in question, is within that category. It might, therefore, well be doubted whether this right could be taken from the company without an appropriate proceeding instituted for that purpose, and prosecuted to judgment by the state. But the view which we take of the case renders it unnecessary to pursue the subject.

We will recur to the conditions of forfeiture touching the land grant, and consider them irrespective of that point. The provisions to that effect, in section 14 of the charter, are expressly superseded by those in section 1 of the supplemental act of February 5, 1856. Section 4 of that act prescribes a further condition. These provisions again are superseded by sections 3 and 4 of the amendatory act of February 10, 1858. The conditions prescribed by the last-named act are :

1. To survey the reserve as far as the Brazos River, within four years from March 1, 1856.
2. To run and designate the center line of the reservation from the Brazos to the Colorado, within fifteen months from February 10, 1858.

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3. To survey the whole reserve within ten years from February 10, 1858.

4. To have a connection with some road leading to the Mississippi or Gulf of Mexico within ten years from February 10, 1858.

5. That the company shall have finished and in running order at least twenty-five miles of their road within one year after it is connected with certain other roads mentioned in the act, and at least fifty miles every two years thereafter until the road is completed.

6. That the right to acquire lands from the state by donation shall cease at the expiration of fifteen years from February 10, 1858.

The first two conditions were performed within the time prescribed. These points are covered by the averments of the bill. The time limited for the performance of the third and fourth is extended from February 10, 1868, to June 10, 1873, by adding the time of the continuance of the war, according to the act of February 18, 1862, before referred to. When the bill was filed there were no such roads as those mentioned in the fifth condition with which a connection could be formed. The fifteen years limited by the sixth condition expired February 10, 1873. The period that elapsed during the war is to be added. That extends the time so much further.

The title of the company is therefore unaffected by the breach of any condition annexed to the grant.

But suppose there had been such breaches, as is insisted by the counsel for the appellants, the result must still be the same.

Except as to a small portion of the land in question the legal title is yet in the state. Whatever may be the right of the company it is wholly equitable in its character. With a few exceptions, which have no applicability in this case, the same rules apply in

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equity to equitable estates as are applied at law to legal estates. They are alike descendible, devisable, alienable, and barrable. *Jickling's Analogy of Estates, &c.*, 17; *Croxall v. Shererd*, 5 *Wall.* 281.

There is wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained. *Wells v. Smith*, 2 *Edw. (N. Y.) Ch.* 78; see, also, as to the principle of compensation, *Beatty v. Harkey*, 2 *Smedes & M. (Miss.)* 563. By the common law a freehold estate could not be created without livery of seizin, and it could not be determined without some act *in pais* of equal notoriety. Conditions subsequent are not favored in the law (4 *Kent Com.* 129), and when they are sought to be enforced in an action at law, there must have been a re-entry, or something equivalent to it, or the suit must fail. The right to sue at law for the breach is not alienable. The action must be brought by the grantor or some one in privity of blood with him. *Nichol v. New York, &c. R. R. Co.*, 12 *N. Y. (2 Kern.)* 121; *Ludlow v. New York, &c. R. R. Co.*, 12 *Barb. (N. Y.)* 440; *Webster v. Cooper*, 14 *How.* 488. In *Dunpor's Case*, 4 *Rep.* 119, it was decided that a condition not to alien without license is finally determined by the first license given.

Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the state herself. By plunging into the

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war, and prosecuting it, she confessedly rendered it impossible for the company to fulfil during its continuance. This is alleged in the bill, and admitted by the demurrer.

The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute. *Coke Littleton*, 206 a, 208 b; 2 *Blackst. Com.* 156; 4 *Kent Com.* 130. The analogy of that rule applied here would blot out these conditions. But this would be harsh and work injustice. Equity will, therefore, not apply the principle to that extent. It will regard the conditions as if no particular time for performance were specified. In such cases the rule is, that the performance must be within a reasonable time. *Hayden v. Stoughton*, 5 *Pick. (Mass.)* 528; 4 *Kent Com.* 125, 126; *Comyn's Dig.*, title Condition, G. 5. We are clear in our conviction that, under the circumstances, a reasonable time for performance had not elapsed when this bill was filed. As the state, by the act of July 27, 1870, created the Southern Transcontinental Railroad Company, and authorized that company to "purchase the rights, franchises, and property of the Memphis, El Paso, & Pacific Railroad Company," it will be but right to allow a reasonable time for that purchase to be made, if such an arrangement can be effected, and for the vendee thereafter to perform all that was incumbent upon the Memphis, El Paso, & Pacific Railroad Company by its charter and the supplementary and amendatory acts. If that arrangement can not be made, the latter company will have the right to provide otherwise for the fulfillment of its obligations to the state within such time, and thus consummate its inchoate title to the lands within the reservation. Either will be in accord

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ance with the principles of reason and justice, and within the spirit of well-considered adjudications. *Walker v. Wheeler*, 2 *Conn.* 299; *Beaty v. Harkey*, 2 *Smedes & M. (Miss.)* 563; *Moss v. Matthews*, 3 *Ves. Jr.* 279; 2 *Vern.* 366; 1 *Id.* 83; 3 *Brown Ch.* 256; *Taylor v. Popham*, 1 *Id.* 168; 1 *Bacon Ab.* 642; 1 *Mad. Ch. Pr.* 41, 42; *City Bank v. Smith*, 3 *Gill. & J. (Md.)* 265.

Both parties will thus be put in the same situation, as near as may be, as if the breaches had not occurred. Neither will be subjected to any serious hardship. The state, by her own acts, has lost the benefits of an earlier completion of the work. The company has lost the income which it might have enjoyed, and has doubtless been thrown into embarrassments it would have escaped. The circumstances do not call for a severe application of the rules of law upon either side.

Breaches of such conditions may be waived by the grantor expressly or *in pais*. *Dumpor's Case*, 1 *Smith Lead. Cas.* 85, American note. Such waiver is expressed in the statutes relating to the subject, to which we have referred, except the act creating the Trans-continental company, and there it exists by the clearest implication.

That the act of incorporation and the land grant here in question, were contracts, is too well settled in this court to require discussion. *Fletcher v. Peck*, 6 *Cranch*, 137; *New Jersey v. Wilson*, 7 *Id.* 166; *Dartmouth College v. Woodward*, 4 *Wheat.* 518; *State Bank v. Knoop*, 16 *How.* 369. As such, they were within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. The ordinance of 1869, and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. *Von Hoffman v. Quincy*, 4 *Wall.* 535.

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When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. *Curran v. Arkansas*, 15 *How.* 308.

A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. A cloud would not only be thrown upon the title of the company, but the time, litigation, labor, and expense involved in the vindication of its rights would very greatly lessen the value of the great and materially delay the progress of the work it was intended to aid. The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results.

It has been insisted that those holding adverse claims should have been brought into the case as parties. They are too numerous for that to be done. An application was made to one of the defendants for a list of their names, and it was not given. The important questions which have arisen between the appellants and the company can all be properly determined without the presence of other parties than those before us.

The parties referred to are sufficiently represented for the purposes of this litigation by the governor and the commissioner of the general land office. We feel no difficulty in disposing of the case as it is presented in the record.

There are other points, ably maintained by the learned counsel for the appellants, to which we have not adverted. They are sufficiently answered by what

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has been said. It would extend this opinion unnecessarily, and could serve no useful purpose, specifically to consider them.

The circuit court decided correctly. The decree appealed from is affirmed.

HUNT, J., did not participate in this decision.

CHASE, Ch. J., and DAVIS, J., dissented.

Decree affirmed.

THE KANSAS PACIFIC RAILWAY COMPANY
v. PRESCOTT.

16 Wallace, 603.

*Supreme Court of the United States; December Term,
1872.*

Lands. Taxes. Where the act of Congress granting lands to a railroad corporation to aid in the construction of its road requires prepayment by the company of the cost of surveying, selecting, and conveying the lands granted before any of the lands shall be conveyed, and also provides that any of the lands granted and not sold by the company within three years after the final completion of the road shall be liable to be sold to actual settlers under the pre-emption laws at a price named per acre, the money to be paid to the company, the title does not pass from the United States to the company, in the first instance, unless there be the required prepayment, nor in the second instance at all, in such way as to subject the land to taxation by a state as the property of the company; and a sale of such lands for taxes is void. The power of a state to tax lands sold by the United States before the government has

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parted with the legal title by issuing a patent, extends only to cases where the right to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right.

Error from the supreme court of the United States to the supreme court of Kansas.

This was a suit by the Kansas Pacific Railway Company against Prescott to quiet the title to certain lands in Kansas, claimed by the defendant.

The company rested its title upon the provisions of an act of Congress, passed in 1862, to aid the construction of the Kansas Pacific Railway, which gave to the railway company alternate sections of the lands of the United States on each side of the road, within certain limits, and provided that a patent should issue to the company only as each section of forty miles in length should be completed and accepted by the president. The act also contained a provision that any of these lands not sold by the company within three years after the final completion of the road, should be liable to be sold to actual settlers under the pre-emption laws, at a dollar and a quarter per acre, the money to be paid to the company.

In 1864, no part of the road having been built, the act of 1862 was amended, by extending the limits of the grant on each side of the road, and by several other provisions favorable to the company. But by section 21 of the amendatory statute it was enacted :

“That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest as the titles shall be required by said company, which amount shall, without any further appropriation, . . . be used by the commissioner

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of the general land office, for the prosecution of the survey of the public lands along the line of said road, and so from year to year, until the whole shall be completed, as provided under the provisions of this act."

The defendant claimed title under a tax sale of the lands in question, for taxes assessed in 1868, under authority of the state of Kansas.

At the time the lands were assessed the railway company had completed the section of forty miles of road within which these lands lay; and the president had accepted the section. But the cost of surveying, selecting, and conveying the lands had never been paid; and no patent for the land had been issued.

The state court, in which the suit was originally brought, dismissed the case, holding, upon the facts in the case, that the lands were subject to taxation by the state. From this decree the complainants appealed to the supreme court of the state, which affirmed the decree; and the complainant thereupon brought this writ of error to review that decision.

J. P. Usher, for the plaintiff in error.

J. G. Mohler, for the defendant in error.

MILLER, J.—The original act of 1862 was amended in 1864 by extending the limits of the grant on each side of the road, and by several other provisions.

A question is raised, whether the provision in section 21 of the amendatory statute of 1864,—by which it is declared that before any of the lands granted by the act should be conveyed to the company, the cost of surveying, selecting, and conveying said lands should first be paid into the treasury of the United States by the company or party in interest,—requires this prepayment of the cost of surveying for the lands

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granted by the original act, or is limited to the lands acquired by the extension of the grant.

Looking to the whole scope of the amended act, and to the provision that the money so paid was to constitute a fund for the continuance and completion of the entire surveys along the road where none had been made, we are of opinion that no patent could rightfully issue in any case until the cost of survey had been paid. None of the road had been built when the amendatory act was passed. No right had vested in any tracts of land, and the power, as well as intent, of Congress to require such payment can not be contested.

While we recognize the doctrine heretofore laid down by this court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right.

The present case does not fall within that principle.

Two important acts remain to be done, the failure to do which may wholly defeat the right of the company to a patent for these lands.

The first is the payment of the costs of surveying. It is admitted that this has never been done in the present case. If the company have such an interest in these lands that they can be sold by the state under her power of taxation, then the title is divested out of the government without its consent, and the right to recover the money expended in the surveys is defeated. As the government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the state can not levy taxes on the land, and under such levy sell and make a title which might in any event defeat this right of

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the federal government reserved in the act by which the inchoate grant was made.

Another important and declared purpose of Congress would be equally defeated by the title thus acquired under the tax sale, if it were valid.

It is wisely provided, that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been for years to encourage settlement on the public land by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that all of it should be open to settlement and cultivation. Looking to this policy, and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not sell those lands within a time limited by the act they should then, without further action of the company, or of Congress, be open to the actual settler under the same laws which govern the right of pre-emption on government lands, and at the same price. Any one who has ever lived in a community where large bodies of lands are withheld from use, or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for that of the actual settler. To permit these lands to pass under a title derived from the state for taxes would certainly defeat this intent of Congress. It makes no difference in the force of the principle, that the money paid by the settler goes to the company. The lands which the act of Congress declares shall be open to pre-emption and sale are withdrawn from pre-emption and sale by a tax title and possession under it, and it is no answer to say that the company which might have paid the taxes gets the price paid by the settler.

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For these reasons we think that though the line of the road had been built and approved by the president, so far as to authorize the company to obtain a patent for this land, if they had paid the cost of survey and the expenses of making the conveyance, yet the neglect to do this and the contingent right of offering the land to actual settlers at the minimum price asked for its lands by the government, forbid the state to embarrass these rights by a sale for taxes.

Judgment reversed.

THE GRAND RAPIDS, NEWAYGO, & LAKE
SHORE RAILROAD COMPANY v.
VAN DRIELE.

24 Michigan, 409.

Supreme Court of Michigan; April Term, 1872.

Lands. Proceedings to acquire right of way. In proceedings by a railroad company to acquire the right of way for its road over lands owned by individuals, the petition must allege that the taking of such lands for the purposes of the railroad company is necessary for the public use.

In such proceedings, a finding by a jury "that it was and is necessary to take and use said land for the purpose of operating and constructing said railroad by said company," is not a sufficient finding that the taking of such property is necessary for the public use.

Appeal to the supreme court of Michigan from the probate court of Kent county.

Grand Rapids, &c. R. R. Co. v. Van Driele.

This was a petition by the Grand Rapids, Newaygo, & Lake Shore Railroad Company, to acquire the right of way for railroad purposes over the lands of Ary Van Driele and others. The petition did not state that there was any necessity for taking the property for public use. A jury was demanded, and twelve jurors having been summoned and impaneled, the matter was tried before them. The report of the jury on the subject of the necessity of the taking for the public use, simply determined "that it was and is necessary to take and use said land, as above described, for the purpose of operating and constructing said railroad by said company." The report of the jury was confirmed as to the award to Van Driele; and he appealed.

Norris & Blair, for the petitioner.

Willard Kingsley, for the appellant.

THE COURT held that a petition to acquire title to lands for railroad purposes should allege that the taking was necessary for the public use; and that the finding of the jury "that it was and is necessary to take and use said land for the purpose of operating and constructing said railroad by said company," is not such a finding of the necessity for taking said property for the public use, either in form or substance, as is required by the constitution. *Mich. Const.*, Art. XVIII., § 2. See *Mansfield, &c. R. R. Co. v. Clark*, 23 *Mich.* 519.

The proceedings must be reversed with costs.

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THE LAKE SUPERIOR & MISSISSIPPI RAIL-
ROAD COMPANY v. GREVE.

17 *Minnesota*, 322.

Supreme Court of Minnesota; July Term, 1871.

Compensation for lands taken for railway purposes. Where a part of a tract of land owned by an individual is taken for the construction of a railway, and the shape of the portion which remains is irregular and inconvenient, the owner is entitled to compensation for the damage resulting from such inconvenient shape. But if, subsequently, a part of the land remaining is sought to be taken by the same railway company, *it seems*, that compensation should not be allowed a second time for the irregularity in shape of the remainder.

Where a statute authorizing a railway company to take lands of individual owners for the purposes of its road provides that upon payment of the compensation determined upon, the company shall become invested and seized of the title of the land, and entitled to full, free, and perfect use and occupancy of the same, for the purposes of a railroad, there is no right remaining in such an owner, part of whose land has been taken, to flow the land taken, in using a water power appurtenant to the remainder of the land. And if the taking of part of the land injures or wholly destroys the use of such water power, the owner is entitled to full compensation for the injury.

Upon appeal from awards of compensation for several separate pieces of property of the same owner taken for railway purposes, an objection that the jury awarded a sum in gross instead of separate compensation for each parcel, is not available if not taken to the award when made.

Appeal to the supreme court of Minnesota from the court of common pleas of Ramsey county.

This was a proceeding by the Lake Superior & Mississippi Railroad Company to acquire, for purposes

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of its railroad, certain lands of Mary Greve and others. The facts of the case in regard to the lands of Mary Greve are stated in the opinion. From the award of the commissioners she appealed to the common pleas, in which court, upon trial before a jury, the compensation awarded was largely increased. The company moved for a new trial, but the motion was denied. From the order denying its motion for a new trial, the company appealed to the supreme court.

James Smith, Jr., for the appellant.

Brisbin & Palmer, for the respondent.

RIPLEY, Ch. J.—Upon proceedings taken by the company to condemn three irregularly shaped pieces of land, described by metes and bounds, and referred to and designated in its petition as tracts A, D, and I, upon an annexed plan, the commissioners awarded as damages for the first tract four hundred dollars, for the second two hundred dollars, for the third five hundred dollars.

The respondent appealed, and upon a trial of the appeal, the jury returned a verdict awarding her the gross sum of ten thousand dollars.

The company appealed to this court from the order of the court below denying its motion for a new trial, made upon the following grounds:

1. Excessive damages, appearing to have been given under the influence of passion and prejudice.
2. That the verdict is not justified by the evidence, and is contrary to law.
3. Error in law occurring at the trial, and excepted to.

The first ground is not urged. It is urged, however, that the erroneous rulings of the court, and refusals to charge as requested by the appellant, have induced a verdict excessive in amount.

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It appears that the respondent was originally the owner of an irregularly shaped tract of land. The railroad was located through it, and by a former condemnation had taken a strip thirty-five feet wide on each side of the center line of such location, and thereby leaving the residue in three irregularly shaped parcels, viz.: two small tracts designated in this case as tract D, and tract I, aforesaid, on the west side, and the rest, constituting the third, on the east side of said seventy foot strip. From this third tract the present condemnation takes tract A.

Under the first condemnation, the commissioners awarded five hundred dollars for said seventy foot strip, which was not appealed from, and had become final.

"It is palpable," says the appellant, "that the commissioners under the first condemnation, must have taken into consideration the fact, as an element of compensation, that these tracts were so left irregular, and their value reduced; yet the court in its charge ignored the former proceeding, and instructed the jury, that 'it is obviously fair that the company should pay for any and all damages done to the property, as well as for the value of that which is taken; and if the shape of the portion which remains be irregular and inconvenient, causing damage, it would be proper for you to consider that fact in favor of the land owner.' This portion of the charge was duly excepted to, and we submit that the court erred, and by its charge has made the company pay twice for the same thing."

No objection can be made to the sentence quoted, in the abstract.

Unless the appellant can show error in the application of the principle therein stated, on the part of the court, or jury, the appellant's position is unfounded. This it has not done.

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The whole of the paragraph quoted from is as follows: "In such cases as this, a party is entitled to a fair market value for property taken by a railroad company. As to the irregularity of shape of the property left, I do not think that has much to do with the case, and for this reason; if a piece of property is cut off by a railroad, for its own use, and without reference to the consent or convenience of the owner, it is obviously fair that the company should pay for any and all damage done to the property, as well as for the value of that which is taken; and if the shape of the portion which remains be irregular and inconvenient, causing damage, it would be proper for you to consider that fact in favor of the land owner."

This plainly has no application to tract D, or tract I, for the appellant took them all.

But tract A was carved out of the large tract on the east side of the railroad aforesaid, so as to leave that which was not taken, in an irregular shape.

It seems impossible but that the court must herein have referred to tract A, and that from which it was taken, and that the jury must have so understood it. It appears by the case, however, that the exception in question also covered what followed, namely, "If there be fifteen acres in a piece of property, and the railroad company takes an acre, they take it just as they please, without reference to its shape; and it would be unfair to take a portion of land worth one thousand dollars per acre, and then say that the portion so taken was not worth at that rate, because (by your action) its shape was irregular."

This refers to the value of the tract taken, and is correct in the abstract. It is applicable to tract A, which is taken in an irregular shape. It has no application whatever to D and I, the whole of which are taken, and which were irregular when taken, an irregularity resulting, too, from the former condemnation;

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whereas it would be unreasonable to say that the words "by your action," referred to any action of the company, other than the proceedings then under consideration.

"So," the charge proceeds, and which is also covered by the exception, "in valuing these portions, you must consider them, not as irregular pieces, but as part of the whole, of which the value was so much per acre; they have taken it as they pleased; if the whole was worth one thousand dollars per acre, the part taken is worth at the same rate per acre. If the railroad company take land of but little comparative value, the principle would be just the same; as to irregularity of shape, the shape would not deliver it (*sic*) from its value, under such circumstances."

This again is correct in the abstract, and correct as applied to the portion A, and the portion of respondent's land from which portion A was taken. It has no applicability to D and I, and it is not presumable, therefore, that the court or jury so applied it. If it be said that the language was open to that construction, because the words "in valuing these portions you must consider them, not as irregular pieces, but as part of the whole," &c., will include all three tracts, the answer is, that their natural application is to portion A, and that from which it is taken. It would scarcely occur to any one to speak of D and I as part of a whole, &c. But if the generality of the language was likely, in appellant's opinion, to mislead the jury, it should have asked for a more specific instruction in that regard.

The exception, as taken, is to what could raise at most but a surmise, that the jury might have been misled by the generality of the language specified, a surmise, however, which is without weight, in view of the fact that D and I are separately described in the petition, and separately appraised by the commissioners,

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and all the witnesses at the trial. It is inconceivable, therefore, that the jury should have supposed that the court, in speaking of a whole from which the company had taken a part, referred to the property as it was before the first condemnation, and considered D and I as still part and parcel thereof.

The appellant requested the court to instruct the jury as follows:

"That the railroad company, in condemning property for railroad purposes, acquires an easement and right to use the property for the purposes for which it is condemned; that in assessing the compensation and damages to be paid to the appellant (respondent here), the same will be assessable upon the theory that the user will be perpetual, and the same compensation allowed as though the fee was absolutely taken; nevertheless, the appellant, as land owner, has the right to the use of the condemned property, provided such use does not interfere with or obstruct the use of the property for railroad purposes; hence, if the flowage of the water along the side of the railroad embankment is in fact no damage or injury to the property, and does not in any wise affect the use of the condemned land for railroad purposes, such user is allowable."

The user referred to is the supposed flowage necessary in any improvement of a water power on respondent's land.

Taking the appellant's construction of the language of the court below to be correct, the court gave this instruction qualified as follows: "That the right of defendant (the appellant here) to the use of land taken by this proceeding for railroad purposes, is absolute and exclusive; that it may cover such land with buildings, or put it to such other use as may be necessary to carry on its proper and legitimate business; and may exclude the occupancy and use of every one else.

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. . . In theory, the law is, that if the land taken by the railroad company was condemned and taken from the general property, he, the owner, would be entitled to the use of the land ; but, in practice, that does not amount to anything. . . . In theory he has a right, but in practice he is at the mercy of the railroad company."

"In all this," says the appellant, "we submit that the court has manifestly mistaken the law of the case."

The argument is, that though the assessment of damages is to be on the theory that the use for railroad purposes will be perpetual, yet they are to be assessed with reference to the kind of use authorized ; that its charter contains no authority for acquiring the fee simple absolute ; a user for certain purposes only is authorized ; the same rights, as to ownership, remain to the land owner as in case of an ordinary highway ; that the company acquired the right of way, merely, through these lands, and the right, of course, to raise its roadbed ; to grade and run its cars over the land appropriated, and acquire no further right ; hence, it has the exclusive use for that purpose only. The jury, from the evidence, and their own actual view of the premises, should have found that the mere flowing back of the water upon the sides of the embankment, could not interfere with the use of the track laid upon the summit for railroad purposes ; that, therefore, the improvement of the water power could not interfere with the user acquired ; yet the ruling of the court is such as to deprive the jury of the right to consider the question as to how far the power could be improved and used, and consequently compelled them to assess damages on the theory that the water power was wholly destroyed.

Assuming the correctness of appellant's view of its charter, all this obviously rests on the assumption

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that the water power could be improved without interfering with the use of the track.

The instruction asked implies that it could be improved by merely flowing the water back along the side of the embankment, and proposes to leave it to the jury as to whether it could or not; but whether it could be or not, the settled case furnishes us with no means of judging.

All that bears upon the point is the evidence of witnesses for the respondent, that the water power is gone unless the respondent has the right to use the embankment, not only, as we understand it, to flow back the water, but to rest one end of the mill dam upon it.

There is no evidence, whatever, that a pond along the side of the railroad track in this place, would not interfere in any way with the use of the road bed and track by the company; and if the improvement involved the use of the embankment for a support to a mill dam and one side of the pond, it would seem that this would necessarily interfere with such free use. One would naturally conclude, for instance, that it would be more difficult to repair a track one side of which is a mill pond, than one which had solid ground on both sides.

There being, therefore, no evidence in the case to support the assumption upon which the instruction asked proceeds, it was a mere abstract proposition, and error can not be predicated on the refusal to give it as asked, though it be abstractly correct. We think, however, that the appellant's argument proceeds upon a misconstruction of its charter. Minn. Sp. Laws of 1861, ch. 1.

By section 2 it is authorized to maintain, use, and operate, and at pleasure to alter the line thereof, a railroad with one or more tracks or lines of rails, together with all proper stations, depots, turn-outs,

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and all other appurtenances and furniture of a railroad.

By section 7 it shall have the right of way upon, and appropriate to its own use and control for the purposes of the said road and its appurtenances, land not exceeding two hundred feet in width, except in cases where a borrowing pit or waste bank is necessary for the construction thereof; in which cases such additional land may be appropriated by said company as may be necessary, and said company may by its engineers, agents, and contractors enter upon and take possession of and use all and singular any lands, timber, streams, and materials of any and every kind for the purpose of making the survey and fixing the location of said railroad, and of all stations, depots, turn-outs, and other things necessary, proper, or convenient for the same and the full use and protection thereof. The state then grants to the company all land owned by the state within said limits, and by section 8 it may take and hold for the said purposes, or any of them, such additional land as may be requisite or convenient therefor; but unless given by or purchased from the owners, full and proper compensation therefor shall be made, to be ascertained as therein prescribed. Among other things, the court is to make an order appointing three commissioners to ascertain and determine the amount to be paid by said corporation to each party interested, as compensation for his interest or estate in such parcel or parcels of land.

The commissioners are to take an oath, faithfully to ascertain and determine the compensation to be paid by the company to the respective claimants, for land, or interest in land to be taken for the use of the company. Upon the payment to the party interested of the amount determined to be due him, the company shall become invested and seized of the title of the land, and entitled to full, free, and perfect use

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and occupancy of the same, for the purposes aforesaid.

The right to the full, free, and perfect use and occupancy of land, is certainly a right to the exclusive use of it. This company is therefore entitled, at all events, in perpetuity, to the exclusive use of this land, for the purposes aforesaid.

Those purposes are to construct, operate, and maintain a railroad, with one or more lines of track, with all proper stations, depots, turn outs, and all other appurtenances of a railroad.

The appellant is therefore mistaken in supposing that it could acquire under said charter only the right of way, and the right to raise its road bed to grade, and run its cars over the land. The land, it says, "is appropriated for its main track merely, as is shown by the plat, and fact of construction and operation."

The plat throws no light whatever on the subject, nor is there any evidence in the case, as to the manner of the construction and operation of the main track, tending to prove anything of the kind. Indeed, the evidence of the respondent is directly opposed to such an assertion; for it appears therefrom that at the time of the trial, the company had already taken possession of tract A, and erected buildings on it. "The machine shop is partly on tract A. The blacksmith shop is wholly on it, and some others." Of course, however, it would be wholly immaterial, if the fact were so, that the company had at the time of the trial put the land to no other use than that of placing thereupon its main track, leaving a space which might be covered with water without interfering with the track.

Whatever the right and title acquired by the condemnation might be, it would not be acquired till judgment upon the verdict (*Carli v. Stillwater R. R. Co.*,

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16 *Minn.* 260), and payment or deposit of the compensation awarded. Section 8 of the company's charter. Acts of the company previously done on the land in the construction and operation of a railroad, can have no effect, therefore, in determining the nature and extent of that right.

The right and title with which it is hereafter to be invested, the full, free, and perfect occupancy to which it is hereafter to become entitled, is the right to an exclusive use of the whole of the tract taken, at any and all times hereafter, for all or any of the purposes above mentioned. This will be as inconsistent in practical effect with a right in the land owner to flow the land, as a lease from him to the railroad company of the land for its purposes aforesaid would be.

The instruction asked required the jury to give the respondent the full value of the fee simple of tract A. The charge actually given amounted to this, in respect of tract A. With respect to the tract left, it instructed the jury, that if the jury find that the taking of tract A has injured the water power of plaintiff (respondent), they may assess full damages for such injury as shown by the evidence.

If the water power could not be used without flowing tract A, the jury must assess the owner's damages on the theory that it was practically gone, for the company might, at any and all times, occupy the whole of tract A for its purposes, to the exclusion of any such flowage, and the instruction would be correct.

It might well be asked in this connection, how the appellant reconciles its position, that this land is appropriated for its main track, merely, and that the land owner might flow all that was not covered by its present road bed, without interfering with the rights acquired by the taking, and its request for an instruc-

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tion, that if such flowage is in fact no damage or injury to the property, and does not affect the use of the condemned land for railroad purposes, such user is allowable with the allegation in its petition, that said tracts "are necessarily and actually required for the proper construction and operation of said road, for necessary borrowing pits, side tracks, water tanks, and stations, and approaches to and upon the line of said road, as now necessarily surveyed, located, and to be constructed; and that the said road can not be possibly constructed or operated as its progress now demonstrates, without procuring for the use of the company all the said tracts."

If the company can not construct and operate its road without using all this land, what right of any practical importance would the land owner have left, consistent with the easement of the company therein?

The next objection is, that the proceedings are erroneous, because the jury have returned a sum in gross, which can not be legally done upon appeals from separate awards on separate parcels of property.

Whether it can be legally done under this charter or not, it is not necessary to determine. The appellant made no objection to the verdict at the time, and as it does not appear how it has been or can be injured by the fact that it is not in detail, the objection can not be raised for the first time in this court. *Babcock v. Sanborn*, 3 *Minn.* 141.

It alleges that it actually needs all the several tracts, and the judgment will give it what it needs, as effectually as if the verdict were in detail. *St. Paul, &c. R. R. Co. v. Matthews*, 16 *Minn.* 341.

The appellant, considering that the instruction asked as aforesaid was substantially refused, asked the court to instruct the jury as follows:

"That in the condemnation in evidence in the pro-

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ceedings against Oliver Ames and others, from the northern limits of the present condemnation through such premises, the said alleged water power of appellant above that point can not be utilized without constructing the abutments of the dam upon land of the company, and without flowing company's land; that then, in such case, said portion of said power within said former condemnation is not to be allowed for in this case, all damages to which the party was entitled by reason of the taking of said premises (described in said former proceedings) are to be taken as already allowed."

This was refused. In support of its exception to such refusal, the appellant urges that the instructions, as they stood, required the jury to assess damages for the whole water power, whereas a part thereof had been already taken.

It is a sufficient justification of the refusal to give the instruction requested, that it instructs the jury upon the matter of fact, that the alleged water power of respondent above the point named can not be made use of without the use of land belonging to the appellant. The words "that then in such case," do not, and could not have been understood by the jury to leave it to them to decide the matter of fact. The instruction states the matter of fact, and then states the law applicable to "such case," that is, the case stated to exist.

Before the court could properly thus charge the jury, it must have been admitted, or proved beyond dispute, that such a state of facts existed.

But the evidence discloses nothing whatever from which it can be inferred whether or not such a state of facts did exist. The proceedings referred to merely show that the appellant thereby took for its purpose a strip of land thirty-five feet wide on each side of its center line, which belonged to respondent, and of

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which land tracts D and I and the tract from which A is taken were part, and part of which lies north of said tracts A, D, and I. Nor can we discover anything else in the case upon which even an intelligent conjecture could be based as to what the water power, if any, of respondent's aforesaid tracts, required for its utilization.

The instructions as given were correct ; as already remarked, they required the jury to assess damages for the value of the land taken, in whatever that value lies, and also that if there was a water power on respondent's land which was injured by the taking of tract A, that they should assess full damages for such injury as shown by the evidence.

A witness called for respondent was asked, "What was the value of this water power before the railroad company took the land in question, and what is the value now?" The appellant objected, on the ground that the examination ought to be confined to the value of the portion not included in the compensation already made. The objection was overruled.

There was no evidence in the case when this question was put, respecting a former condemnation. The court was right, therefore, in overruling the objection, and if the former condemnation, when subsequently proved, affected the question, the appellant might have requested the court to have the evidence struck out.

The appellant urges in this court, that the question was improper, because the time for assessing damages is the date of filing of the report of the commissioners. This objection was not made below and can not, of course, be considered here.

One ground of the motion for a new trial is, that the verdict is not justified by the evidence. The appellant has not discussed the evidence with reference to this, and it is wholly unnecessary that we

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should do so, inasmuch as the settled case does not purport to contain all the evidence.

Order affirmed.

THE MINNESOTA VALLEY RAILROAD COMPANY v. DORAN.

17 *Minnesota*, 188.

Supreme Court of Minnesota ; July Term, 1871.

Compensation for land taken for railway purposes. Upon appeal from an award by commissioners of compensation to an owner of land taken for or damaged by the construction of a railway, the land owner holds the position of plaintiff, and is entitled to open and close.

That the owner of land across which a railway company has located and constructed its road has sold large quantities of wood and ties to the company, and has realized large profits therefrom, in consequence of the location of the railroad across his land, does not constitute a benefit to him which may be allowed in recoupment of damages to his land resulting from the construction of the railroad.

Although in estimating the compensation to be allowed for injury to lands from the construction of a railroad, mere inconvenience in crossing the track is not a proper item, necessary delay and labor in opening and shutting gates and taking down and putting up bars may properly be considered.

Where a railway company is required by law to build and maintain a legal fence on each side of its railroad through improved lands, for the protection and benefit of the owner of such lands, if such fences constitute a further obstruction to the use of the lands by the owner, in addition to the injury resulting from the construction of the road itself, in determining the compensation to be awarded

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him, such fences may properly be considered as an element of damage.

Trial. Instructions to jury. In proceedings to which a railroad corporation is a party, general propositions in a charge to the jury that corporations are naturally grasping and avaricious, and other remarks of like character, with a caution to the jury not to be influenced by such considerations, are not, on appeal, ground for reversal, where no application of such remarks is made by the judge to the parties or to the facts of the particular case. Even if erroneous, such propositions upon abstract questions are not ground for reversal.

Appeal to the supreme court of Minnesota from the district court for Le Sueur county.

This was a proceeding by the Minnesota Valley Railroad Company to acquire, for purposes of its railroad, certain lands of Michael Doran. The facts of the case appear from the opinion. From the award of the commissioners, Doran appealed to the district court, on the ground that the compensation awarded him was inadequate. The decision of the district court, upon appeal to the supreme court, was reversed, and a new trial ordered. Upon such second trial a verdict was rendered for Doran. The railroad company moved for a new trial, but the motion was denied. From the order denying its motion for a new trial the railroad company appealed to the supreme court.

Swan & Bangs, for the appellant.

Caldwell & Severance, and *Brisbin & Palmer*, for the respondent.

RIPLEY, Ch. J.—This is the case in which a new trial was heretofore ordered. 15 *Minn.* 230. The appeal taken by Doran from the award of the commissioners was upon the ground that the award of said

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commissioners is a wholly inadequate compensation for the taking of said several parcels of land.

The said appeal coming on for trial at the October term, 1870, of the district court for Le Sueur county, and a jury impaneled to try the issue raised on said appeal, having viewed the premises, the railroad company offered to proceed and introduce evidence in support of the issue made by said appeal on the part of said company, to which Doran objected.

The court decided that Doran should assume the position of plaintiff in the cause, and proceed to introduce his evidence in support of the issue made, to which the company excepted.

The company's charter provides that "the cause upon such appeal shall be entered, proceeded in, and determined, in the same manner as cases on appeal from courts of justices of the peace." *Minn. Laws of 1855*, ch. 24, § 6.

Minn. Gen. Stat. ch. 65, § 108, provides, as to the entering of such appeals, that, "The appellant shall cause an entry of the appeal to be made by the clerk of the court, on or before the second day of the term, unless otherwise ordered by the court, and the plaintiff in the court below shall be the plaintiff in the court above." Strictly speaking there is here no plaintiff in the court below. The statute contemplates a separate cause as arising on the taking of the appeal between the company and each land owner who may appeal, or *vice versa*; and as the commissioners are not a court in the sense of this language, and their mode of procedure is discretionary in the matters here involved (see 16 *Barb. (N. Y.)* 68), where the language of the court applies very well to the provisions of this charter), the provision in question can have no other bearing, if any, in a case of this kind, than that the appeal, as to the relative position of the parties upon the calendar, shall be entitled as the proceedings

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theretofore were, viz.: the company as petitioner, and the land owner as respondent. The charter proceeds to say, that in case the appeal shall involve the determination of any question of fact, the same shall be tried by a jury. It is of course to be tried in the same manner as an action originally commenced in the district court.

Minn. Gen. Stat. ch. 66, § 209, provides that unless the court for special reasons otherwise directs, the plaintiff shall open and close.

Under the discretion hereby given, the district courts of this state, like those of the territory, have, and rightly, regulated the conduct of the trial in this respect according to the immemorially established rule of both common and civil law, viz.: that the side which holds the affirmative of the question in issue shall open and close. 2 *Bl. Com.* Book 3, ch. 23. p. 366.

There could not be a fitter case for the exercise of discretion in this direction than on appeals of this kind. The issue before the jury is the amount of compensation to be paid by the company to the land owner for the taking or injuriously affecting his land, in determining which, the jury are to take into consideration the benefits to accrue to him by the construction of the road, and allow the same by way of recoupment against the damages sustained thereby, and return their verdict for the balance of damages.

This settles the question as to the right to open and close in favor of the land owner. The analogy is perfect between this case and an action for unliquidated damages or breach of contract, in which defendant claims a set-off by way of recoupment under *Minn. Gen. Stat.* ch. 66, §§ 79, 80, in which there could be no question that the affirmative of the issue was on the plaintiff. The case of *Connecticut River*

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R. R. Co. v. Clapp, 1 *Cush. (Mass.)* 559, is in point. In that case the railroad company appealed from the award. "In cases where a reassessment of damages is to be made by the jury, after an assessment has been made by the commissioners, it is immaterial which party makes the application for the assessment. The party claiming damage, the same being unliquidated, and to be settled by the jury, has the right of opening and closing the cause. 1 *Greenl. Ev.* §§ 76, 77; *Mercer v. Whall*, 5 *Adolph. & El.* 447. In this case the rule is, we think, correctly laid down by Lord DENMAN, and is decisive as to the present case. 'Whenever,' he says, 'from the state of the record at *Nisi Prius*, there is anything to be proved by the plaintiff, whether as to the facts necessary for his obtaining a verdict, or as to the amount of damages, the plaintiff is entitled to begin.' . . . The only question for the jury in this case, was a question of damages, which they were bound to assess without any regard to the previous assessment by the commissioners. There seems, therefore, no reason for allowing the petitioners to open and close."

The force of this authority is not affected by the circumstance, that in Massachusetts the application for assessment of damages, in the first instance, may be made by either party; nor by the fact that the statute of Massachusetts does not, like ours, provide in terms that the land shall not be taken without compensation first paid or secured. The decision does not proceed at all upon such considerations. "Whether the land owner, being desirous to get his damages, is usually the moving party, and whether in all those cases the laws of Massachusetts look on him as a claimant and the acting party," as suggested by the petitioner, would obviously have been held as immaterial by the court, as the question as to which party applied for the jury would have been.

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It does not appear who initiated the proceedings in the case above cited, and it could have made no difference which. Before the jury, the parties stood just like the parties here; for in Massachusetts the jury estimate the damage to the land owner by taking or injuring his property, and allow by way of set-off the benefit, if any, by reason of the construction of the road.

The company called the respondent as a witness and asked him the following question: "What is the worth of cord-wood and railroad ties sold by you to the railroad company taken from the farm land in question?" Which was objected to by the respondent; the objection was sustained, and appellant excepted. This ruling was, of course, entirely correct.

The company then offered to prove that the respondent had sold large quantities of wood and ties to the railroad company, and had realized large profits therefrom, in consequence of the location of the railroad across the land, to which the respondent objected, and the objection was sustained.

The appellant insists that this was an offer to show such a benefit as the jury were authorized to allow in recoupment of the respondent's damage. How far it is from being such will appear from one or two very obvious reflections. Such benefit must accrue from the construction of that particular portion of the road which runs through plaintiff's land, and it must accrue directly from such construction. .

The offer, in brief, is to prove that the respondent got a large price for wood and ties sold the company, because the road was on his land.

Now leaving out of view the fact that the offer did not, as the excluded question did, specify that the wood was taken from the land; and assuming that it was, which the court below was by no means obliged

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to assume in ruling upon the offer, it will at once be perceived, that such offer is obnoxious to the objection which was held fatal to the instruction asked and refused in *Minnesota Central R. R. Co. v. McNamara*, 13 *Minn.* 508; viz.: that it does not limit the supposed benefit to the land of the respondent.

Whoever in the county had cord-wood or ties to sell, might, for aught the offer discloses, have sold them to the company at as high a price as the respondent, and for precisely the same reason; viz.: that the road crossed respondent's land. To be sure, we can not see how, but neither can we see how the mere fact that the road crossed his land could have possibly made the company give him more for his fuel and ties, than it would have done if the road had been near his land, but not on it. We must take the offer as it was made.

The case purports to set out neither the evidence nor the charge in full. Portions of the general charge which are given, are said by the appellant to be obnoxious to the objection of great unfairness to the appellant, and naturally tending to prejudice the jury against it; and we are urged, for that reason, to set the verdict aside.

The respondent, on the other hand, considers that the remarks of the court were intended to caution the jury against prejudice. We can not say, on this record, that he is wrong.

The remarks objected to begin with the statement that "considerable has been said by counsel *pro* and *con.*, with reference to the fact that one of the parties to this proceeding is a railroad corporation."

We all know what the usual arguments are on this head from our own observation, and when the jury has been thus addressed, we do not perceive how it could have any tendency to inflame them against appellant, to tell them, that corporations, like the individuals

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that compose them, are naturally grasping and avaricious (whether this be a sufficiently cheerful view of human nature or not), and that the combinations of men, and the concentration of great wealth in their enterprises, generally creates a power which may be and frequently is used to the detriment of the people, and they should, therefore, be carefully watched, and closely guarded ; but that the ballot-box, and not the jury box is the place for that ; and that, therefore, the jury should exclude all such considerations from their minds in considering the case ; which is, in substance and effect, the language which is objected to.

The appellant complains, that being a corporation, it is hereby held up to the jury as avaricious and grasping ; but inasmuch as the jury are told that all mankind are necessarily equally so, such a general remark could hardly excite a prejudice against the appellant. Nor does the judge make any personal application to the appellant. It is not stated to be wealthy, or powerful, or corrupt, or to be making a bad use of its power.

There is no pretense on this record for saying that in the statement of these general propositions respecting corporations, and his caution to the jury against allowing themselves to be influenced by such considerations, the judge was not acting in good faith ; if so, it is immaterial whether the theories in question are well founded or not, for, even if they are not, an erroneous opinion upon an abstract question is no ground of error.

The seventh instruction requested by the appellant is as follows :

“The jury shall not take into account, or include in their estimate of damages, any sum for mere inconvenience in crossing the track of the said road from one side of the track to the other ;” which was given with this qualification, which appellant excepted to ;

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"but this does not mean, that where it is necessary to open and shut gates, or let down and put up bars, that the delay in time or labor in doing so, is not a proper subject for you to consider in making an estimate of the damages; on the other hand, I think it would be proper to consider it as an element of damages."

The objection made by appellant, that this qualification was assuming facts not proved, is not open to it in this case, which does not purport to contain all the evidence.

As to the correctness of the qualification in point of law, it can not be said that delay and labor in opening and shutting gates, and taking down and putting up bars, are the elements that make up, or go to make up, "the mere inconvenience in crossing the track," which, in accordance with the decisions of this court, was charged not to be an item of damage. 11 *Minn.* 531.

If the road were fenced, there must be bars, or gates, or the track could not be crossed at all; to take down the bars or open the gate would be a prerequisite to crossing, not a "mere inconvenience in crossing" the track. The necessity of so doing certainly detracts from the free use and enjoyment of the property. In so far as it does, it injuriously affects the property, and is to be considered by the jury.

It may also be observed, as to the matter of fact, that aside from the consideration that the case does not contain all the evidence, it is quite an assumption on appellant's part, that the whole distinction only existed in the mind of the court.

It appears by the next instruction that this road had been built and fenced by the company through the improved lands; if so, there must be gates or bars in those fences if the "respondent is to cross the track at all in the cultivation of the farm," and that he

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would be obliged to do so is fairly to be inferred from the evidence of Aldrich, who says, "the road is a great trouble;" of Wood, who says, "it cuts the farms up into badly shaped fields;" and of King, who says one "can work the land on each side of the road, but it would be a great deal of trouble. The road cuts through the cultivated land; leaves some on both sides;" and of Daily, who says, "the road runs through the most fertile part of Doran's farm."

The eighth instruction requested, was given as follows: "The jury, in assessing the damages to be paid by the respondent for the right of way across the farm lands, shall take into account that the railroad company is obliged to construct and maintain all necessary and proper cattle guards and farm crossings, and also, within two years after the completion of its road through any improved lands, shall build, keep, and maintain a legal fence on each side of its railroad through such improved lands." To this the judge added: "Yes, gentlemen, this is a proper matter for your consideration, and as it is admitted in this case that the land has been taken, the road has been built, and the fences already erected, I think it would also be a proper matter for your consideration, as to whether the fences themselves do not create a further obstruction to the free use of this farm; *i. e.*, whether the fences and road do not damage the appellant more than the road alone would do. I think that would be a proper subject for you to consider as an element of damage." To this qualification the appellant excepted.

The objection that there is no evidence going to show whether the fences and road damage the land owner more than the road alone, can not prevail for the reason already stated, that the case does not purport to contain all the evidence; nor can we assume, without evidence, that such may not have been the

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case, in point of fact, in respect to this particular farm. The appellant's objection does not proceed upon the ground that it was not; but it is said that the law compels the company to build the fences; that they are meant for the owner's benefit, and the statute did not mean that the company should have to pay extra for being obliged to build them.

It can not be contended, however, but that compensation should be made for all such loss or damage as may result from the construction and use of the road, in a manner required by the law. Though the law compelled the company to build these fences, intending thereby to benefit the land owner, yet, if in any instance they are in point of fact an injury, it is not perceived why the land owner should not be compensated therefor.

We do not think that the charge is to be looked at as duplicating the element of damage referred to in the seventh instruction. In the first place, as the charge is not given in full, these qualifications may have been rendered necessary by the rest of the charge, and each qualification was proper in its connection, to prevent the jury from being misled by the generality of the requests. They might suppose, for instance, with the appellant's counsel, that the "inconvenience of crossing the track" included the inconveniences in the way of getting to it, and it might have been so argued to them. They might also suppose, and it might have been argued to them, that as the company had fenced the road in the manner required by law, it made no difference that the result was a further injury to that caused by the road itself; and without some such explanation as that given, they might construe the eighth request into a direction to consider the matter of fences solely as a credit.

If this qualification might itself mislead, by its generality, the appellant might have asked to have

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it made more specific, so as to exclude any such danger.

It will, of course, suggest itself, that while to the freest and most profitable cultivation of improved land, a railroad running longitudinally through it, is necessarily a hinderance, a fence on each side of such road may be a still greater one; and this, altogether independent of the inconvenience of opening and shutting such particular gate, or bars, as may have been placed at any farm crossing, if any, located there.

There might be, for the purposes of such cultivation, gates or bars rendered necessary by such fences, at points which would not come under the appellation of necessary farm crossings, which, therefore, must be made at the owner's expense, and then only by the company's permission, all of which matters might have been in evidence, and not reported.

We see no ground for the objection that the damages are excessive.

The respondent, indeed, himself estimated the damage to the farm at one thousand three hundred and fifty-two dollars, while the jury awarded one thousand five hundred and twenty-seven dollars and seventy-five cents; but they were not bound by his estimate. Seven witnesses estimated the damage to it at more, ranging from three thousand dollars to one thousand six hundred and ninety-four dollars. On the other hand, while the respondent considered his lots to be injured in the sum of one thousand one hundred and fifty dollars, the jury awarded but five hundred and seventy dollars. On the whole, we perceive no error for which this verdict should be set aside.

Order affirmed.

KING v. THE IOWA MIDLAND RAILROAD
COMPANY.

84 Iowa, 458.

Supreme Court of Iowa ; June Term, 1872.

Compensation for lands taken for railway purposes. In determining the compensation to be awarded for lands appropriated for the construction of a railroad, evidence of damages resulting from the negligent or defective construction of the railroad is not admissible, under a statute providing that the owner shall be compensated for the damage he "will sustain by the appropriation of his land." Such damages may be recoverable in a proper action therefor, but they do not constitute an element of the value of the land, or of the compensation to be allowed the owner.

Thus, the fact that the railroad was constructed in such a manner that water falling upon the land appropriated was conducted upon adjoining lands of the former owner to the injury of his crops thereon, is not proper to be considered. Nor can the failure of the railroad company, for a time, to construct cattle-guards, as required by law, so that the remaining lands of the former owner are thrown open and left unfenced, be included in estimating the compensation.

In determining the value of land taken for the construction of a railroad, evidence of the price at which the right of way through adjoining tracts was purchased is not admissible, unless a uniformity in character of the lands thus sought to be compared is first shown.

In proceedings to determine the compensation to be awarded for land taken for railway purposes, the court may, in its discretion, send the jury to view the land in question.

Appeal to the supreme court of Iowa from the circuit court for Jackson county.

This was a proceeding before a sheriff and a jury to assess the damages sustained by King from the loca-

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tion and construction of the Iowa Midland railroad upon his lands. From the assessment, King appealed to the circuit court, and upon the trial in that court a verdict was rendered in his favor, as plaintiff, for eight hundred dollars. From the judgment entered upon this verdict, the defendant appealed to the supreme court.

E. S. Baily and *C. M. Dunbar*, for the appellant.

Frank Amos, for the appellee.

BECK, Ch. J.—1. Upon the trial the plaintiff, against the defendant's objection, was permitted to give evidence of the manner in which the railroad of defendant was constructed upon plaintiff's land, and to show that water falling upon the land appropriated was, by a ditch along the track of the railroad, conducted into plaintiff's field, and that on one occasion a quantity of hay and an acre of corn were destroyed thereby. The evidence was improperly admitted. Damages resulting from the negligent construction of the railroad and consequential injuries, such as were proved by the evidence just stated, are not to be considered in assessing the compensation to be allowed the owner of land appropriated for the use of a railroad. Such damages are recoverable, when sustained, in proper actions, but do not constitute an element of the value of the land, or of the compensation to be allowed the owner. It is very plain that such damages do not result from the appropriation of the land for the right of way by the railroad company, and it is not competent in a proceeding of this character to award compensation therefor. The owner is to be compensated for the damage he "will sustain by the appropriation of his land for the use of the railroad corporation" (*Rev. § 1317*), and not for negligent

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acts or the like committed after such appropriation. *Satin v. B. & M. P. Plank Road Co.*, 1 *Iowa*, 384; *Flemming v. Chicago, &c. R. Co.*, 34 *Id.* 353.

2. The circuit court recognized this view to be the law in an instruction to the jury, but in another instruction directed the jury to allow damage in a sum not exceeding the cost of preventing the overflow of plaintiff's lands by the water from the ditch, provided it would require therefor but a small expenditure of labor or money. A witness for defendant testified that the cost of preventing the water flowing on plaintiff's land would not exceed five dollars. Plaintiff's counsel insist that, conceding the damage contemplated in this instruction can not be recovered in this action, yet, under the evidence, the sum allowed could not exceed five dollars, and for such an error the judgment should not be disturbed. Did we know that the finding of the jury under the instruction was limited to five dollars, it probably could be fairly claimed that the judgment should be corrected in that amount and be permitted to stand. But we have no assurance from the record that this sum is a limit of the effect of the instruction, which, as we have seen, is clearly erroneous.

3. The plaintiff, against defendant's objection, was permitted to state that the construction of the railroad threw his farm open to the commons, though, in the same answer, he states that cattle-guards had been put in. An instruction given by the court to the jury, directed them to consider the fact, if they should so find, that plaintiff's farm "was thrown open and left in a manner unfenced," in arriving at the depreciated value of land, to be determined in order to arrive at the true measure of damage.

The fact of the failure of the defendant, for a time, to erect cattle-guards, and thus "in a manner" to throw plaintiff's farm open as a common, could not be

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considered, in this proceeding, in estimating the compensation to which plaintiff is entitled for the appropriation of his land for the use of the railroad. By chapter 169, section 3, acts ninth general assembly, it is made the duty of railroad companies to construct proper "cattle-guards" upon their roads whenever they run through improved or fenced land. A failure to comply with this request subjects the company to liability for damages resulting therefrom. For a breach of this duty imposed upon defendant, plaintiff may maintain an action, but damage resulting therefrom can not increase the compensation to which he is entitled in this proceeding for the land appropriated by defendant. The court erred in admitting the evidence and instructing the jury as stated.

The foregoing remarks will not be understood as applying to the failure of the defendant to erect fences along the line of its road, in connection with the fact that it may erect them at its option, but while omitting to do so, it is liable, under the statute, for injuries sustained by the land owner resulting therefrom; nor will we be understood that these facts, if they in effect operate to depreciate the value of the land, may not be considered in proceedings of this character. Neither will the rule we have stated be considered as in disregard of the doctrines of *Henry v. Dubuque, &c. R. R. Co.*, 2 *Iowa*, 288 (306). The statute above cited was enacted after that case, and sufficiently accounts for any difference appearing in the principles of that decision and those above stated.

4. The engineer and agent of the defendant testified that he had, for the company, purchased the right of way for the road from the owners of the tracts of land adjoining plaintiff's on the east and west, and from others owning lands in the vicinity over which the railroad was constructed. He was then asked, by defendant's counsel, to state at what price the pur-

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chase was made of the right of way through the adjoining tract on the east. Objection to the evidence sought to be elicited was sustained by the court. This ruling, in our opinion, was correct. It was not proposed to show, by the evidence, that the tracts were of like character—that the right of way over plaintiff's land was of the same value as the same right over the adjoining lands—or that it had a uniform or marketable value in that neighborhood. Without facts, before the jury, of this kind, tending to show that the proposed evidence would have a bearing upon the question of the true value of the property taken by defendant, the proof offered was irrelevant and incompetent, and for that reason properly excluded. Other reasons supporting the same conclusion could be given. An authority is cited by defendant's counsel (*Wyman v. Lexington, &c. R. Co.*, 13 *Metc. (Mass.)* 316), in support of the admissibility of the evidence. The decision is based upon the principle, that evidence of sales, by other parties, of tracts adjacent, would be competent to establish the value of lands in a case wherein the value is in issue. But, in such a case, the evidence is admissible only where it appears that there is a uniformity in the character of the lands thus brought in question with those made a criterion of their value; but, as before remarked, it was neither proposed nor attempted to be shown that, in this case, such uniformity existed.

5. During the progress of the trial, the defendant asked the court that the jury be permitted to have a view of the premises and property in controversy. Nothing appears in the record showing the ground of this request. The statute confers upon the court the power, whenever, in its opinion, the proceeding is proper, to direct that the jury be conducted in a body to real property in controversy, for the purpose of inspecting the same. But the exercise of this author-

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ity rests in the judgment and discretion of the court. It is not made to appear to us that the decision upon the request was not correct, or that the discretion of the court in this matter was abused. The ruling complained of is not a just ground of objection to the judgment of the court below.

We have noticed, substantially, all the points made by appellant's counsel. For the error above pointed out, the judgment of the circuit court must be reversed.

Judgment reversed.

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PAUL & PACIFIC RAILROAD COM-
PANY.

17 *Minnesota*, 439.

Supreme Court of Minnesota; July Term, 1871.

Compensation for lands taken for railway purposes. A provision in a railway charter requiring that in awarding compensation for lands taken for the purposes of the railway, the value of the lands shall be appraised at the time they are entered upon and taken, does not contemplate an appraisal at the time the lands are entered upon for the survey and location of the road, merely, but at the time when the property is actually appropriated to the use of the railroad company.

The legislature can not confer power upon a railway company to take and use private property without making or securing compensation therefor. And provisions of the charter of a railway company, purporting to authorize the company, after entering upon and taking

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lands of individuals, to have, hold, possess, occupy, use, and enjoy the same for any of its lawful purposes, from the time of such entry and taking until the proceedings contemplated by the charter to be instituted by the company, to ascertain the value of such lands, shall have been finally determined, and until the company shall have refused, after demand made, to pay such value to the owner; and that during such time, and until such refusal, the company shall not be disturbed in such possession, or occupancy, or use, or enjoyment, by any proceedings, either in law or equity, are unconstitutional and void.

It seems, that payment of the value of the land actually taken to the owner is not sufficient to satisfy the requirement of the constitution of the United States, that private property shall not be taken for public use without just compensation. The value of the property taken may be no measure of the injury sustained by the owner.

Even if the value of the property taken could, in any case, amount to compensation to the owner, an award and tender of such value, with interest from the time of the taking, made after the commencement of an action by the owner against the railway company, for entering upon and taking his land, does not constitute a defense to the action; and a motion for leave to file a supplemental answer, setting up such an award, since the answer, and making tender of the amount awarded, is properly denied.

Appeal to the supreme court of Minnesota from the district court for Hennepin county.

This was an action by Jacob Hursh against the First Division of the St. Paul & Pacific Railroad Company, for entering upon, and taking possession of, his land for the construction of the defendant's railroad.

The complaint alleged that upon November 1, 1866, the defendant wrongfully entered upon plaintiff's land, described in the complaint, and took possession of a strip thereof one hundred and sixty rods in length by one hundred and thirty-nine feet in width; that defendant cut down and carried away the trees growing upon the land so taken by it, and constructed upon said land its railroad, which it has

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since, for more than two years, continued to operate, depriving the plaintiff of the possession, use, and enjoyment of said land ; that defendant threatens to continue to deprive, and unless restrained therefrom by the court, will deprive plaintiff of the use and enjoyment of said land, and will occupy the same for its railroad forever ; that plaintiff has been damaged to the several amounts mentioned in the complaint by reason of the removal of said trees, the construction of the railroad upon the land, and the continued occupation and use of the land for such railroad. The plaintiff thereupon asks judgment for the amount of the damages sustained by him, and for an injunction.

The allegations of the answer, so far as material on this appeal, are the incorporation of the defendant and its power to take private property, under certain acts of the legislature ; the location by defendant of the route of its railroad through the counties of Hennepin and Wright, and over the strip of land described in the complaint ; the lawful taking by it of the said strip for railroad purposes ; the due commencement of proceedings to condemn the lands along its said route, entered upon and used for its railroad ; the due appointment of commissioners, "who are proceeding with all due and convenient speed in the manner specified by law to make an appraisal and award of the value of the lands so entered upon, occupied, and used, including the strip of land described in the complaint, but that such appraisal and award has not yet been made by the commissioners."

The summons and complaint were served April 2, 1870, and the answer was served April 21, 1870.

On May 6, 1870, the defendant moved for leave to serve a supplemental answer, alleging that, since the service of the answer, and on May 2, 1870, the commissioners, having first given due notice to plaintiff as

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prescribed by law, examined the land described in the complaint, and, after such examination, the commissioners on the same day appraised the value of said land at the time it was entered upon by the defendant, to wit: November 1, 1866, with the trees standing thereon, at the sum of one hundred and thirty dollars, and awarded to plaintiff the said sum with interest thereon from November 1, 1866, amounting at the date of the award to one hundred and sixty-one dollars and ninety cents; that the commissioners on May 3, 1870, duly filed their award and delivered a copy thereof to the defendant; that the defendant is ready to pay plaintiff the said award, and brings into court the amount thereof with interest from the date of the same, and also offers to pay plaintiff costs of this action, to be taxed.

The motion was denied; and from the order denying the motion, the defendant appealed.

Bigelow & Clark, for the appellant.

Lochren & McNair, for the respondent.

RIPLEY, Ch. J.—The motion for leave to file the supplemental answer was rightly denied.

By section 3 of the defendant's charter (*Minn. Laws of 1857, Extra Sess. p. 3*), it may enter upon lands for the purpose of making surveys, and for the right of way, and may appropriate to its sole use and control for its purposes as a railroad, land not exceeding two hundred feet in width, throughout its line, and enter upon, and take possession of, and use any lands beyond that width for depot, stations, station grounds and houses, and various other purposes specified and necessarily incident to the complete construction, operation, and preservation of the road; and lands belonging to individuals may be taken and

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appropriated for the purposes aforesaid, and shall be valued and paid for as thereafter provided.

At this point, and in the outset, and on the most cursory examination of this section, it is obvious that, whatever be the precise meaning of the words, "and for the right of way," it is not the right to enter on any lands whatever therefor, and to make surveys, which is to be valued and paid for; but the land of individuals or corporations, which, by the succeeding clauses, is to be taken and appropriated to the defendant's use, to the width of two hundred feet throughout its line, and in some localities to a greater width.

By section 13 it is provided that, whenever the line of the road . . . shall be located and its route determined, it may apply for the appointment of commissioners "to appraise and award the value of all lands belonging to any private person on its line, which it shall have entered upon, possessed, occupied, or used, or which it may thereafter enter upon, take, possess, occupy, or use for any of the purposes for which, by this act, the said company is authorized to enter upon, take, possess, occupy, or use lands."

No particular land need be designated in the application, nor need the corporation have determined what particular land it will appropriate, either within the two hundred feet or beyond it. All that is required, is, that it shall have located its line and determined its route. *Wilkin v. First Division St. Paul, &c. R. R. Co.*, 16 *Minn.* 271.

The commissioners are to have cognizance of all cases arising on the line of the road, or on so much thereof as shall be designated, and in each case shall examine the premises separately, and shall separately make an appraisal and award of the value thereof at the time when it was so entered upon and taken. On award made and no appeal taken, or on final judgment

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rendered on appeal, and not before, it is the duty of the company to pay to the land owner the amount so awarded or adjudged; and on payment or tender an absolute estate in fee simple in such lands shall become vested in the company, and the said company shall have full power and authority, after entering upon and taking any such lands, to have, hold, possess, occupy, use, and enjoy the same for any of the lawful purposes of said company, from the time of such entry and taking until the proceedings contemplated by the act shall have been finally determined, and until the said company shall have refused, after demand made, to pay the value of said land, so ascertained as aforesaid; and shall not, during such time nor until such refusal, be disturbed in such possession or occupancy, use or enjoyment, by any proceedings either in law or equity.

The value of the land is to be appraised at the time it was entered upon and taken, and the first question to be considered, is, as to what this means. The supplemental answer alleges that the commissioners have awarded the value of the land as it was November 1, 1866, with interest since, to the date of the award. On said November 1, it alleges that it was entered upon for railroad purposes. This, in strictness of pleading, must be taken to be an allegation, that it was then first entered upon for such purposes. Is this synonymous with the entry and taking, at which the value is to be appraised? Clearly it can not be. An entry for survey and location of the line would assuredly be an entry for railroad purposes, yet, as we have seen, such an entry would not be a taking of land to be valued and paid for.

This consideration, of itself, disposes of the case; for an award of the value of the land at a time when it had not been taken as it would be unauthorized, would be wholly irrelevant.

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Nor, on this construction of the supplemental answer, would it be necessary for us to determine when the land is to be deemed to be entered upon and taken. It is enough that a time subsequent to an entry thereon for survey and location is plainly intended by the act.

It may be said, however, that taking the answer and supplemental answer together, it is fairly to be intended, that the entry upon the strip of land one hundred and thirty-nine feet wide, described in the complaint and answer, for railroad purposes, and which is the same entry referred to in the supplemental answer, is a different and subsequent entry from any entry that it would be requisite to make on the northerly part of plaintiff's land for the survey, location and marking of the line of the road on the ground described in the answer.

If this construction be admitted, such entry for railroad purposes must be deemed to have been for the purpose of further prosecuting the contemplated enterprise of constructing and operating a railroad upon the line already marked out; and the question recurs, whether an allegation of an entry on said strip for such purposes be tantamount to an allegation, that said strip was entered upon and taken. In *Carli v. Stillwater, &c. R. R. Co.*, 16 *Minn.* 260, it is held that the land is not taken till award made. But that case arose under the general railroad act, by which the commissioners are to examine the lands that will be taken, and shall appraise to the owner of the land proposed to be taken, the damages arising from such taking. *Minn. Gen. Stat.* ch. 34, § 19. Under this charter they are to appraise the value of land, which the company shall have entered upon, possessed, occupied, or used, or which it may thereafter enter upon, take, possess, occupy, or use; and shall award the value of the land so entered upon, taken, pos-

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essed, occupied, or used, at the time when it was so entered upon and taken, and, on appeal, the court shall assess the value of the lands so entered upon, taken, possessed, occupied, and used, at the time when the same was entered upon and taken. It is herein plainly implied, that the taking may be prior to the award, for it is evident, for instance, that, in the clause specifying the object of the appointment of the commissioners, the words "entered upon, possessed, occupied, or used," and "may thereafter enter upon, take, possess, occupy, or use," are employed to designate the same class of acts, viz.: acts which will amount to an appropriation to the use of the company of the private property in question, and in consequence of which appropriation it is to be paid for; and any or all of such acts may have taken place prior to the award.

Further, when they are directed to appraise the value of land so entered upon, taken, possessed, occupied, or used, at the time it was entered upon and taken, we think it evident that "entered upon and taken," referring, as it does directly, to "entered upon, taken, possessed, occupied, or used," means just that; that is to say, to constitute an entry and taking, which will amount to such appropriation, the land must be entered on for the purpose of construction of a railroad thereon, by an entry which will involve and require the taking and keeping by the company of the possession and occupation thereof; or if, in any case, not of the permanent, actual possession, yet of the use thereof to the exclusion of the owner. An instance of the latter might be a gravel bank, of which the company might not require to be in the actual, constant possession and occupancy, yet might require the use of the whole, to be removed as wanted, in which case, if it were measured and staked out by the company, the entry thereon therefor might

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well be held to be, an entry and taking under the charter provision in question.

So, a strip of land, required for a road-bed, might well be deemed to be taken, when it was staked out or cross-sectioned. Entering thereon for such a purpose would involve, in carrying out the work, an exclusive possession, and might well be deemed an appropriation thereof to the sole use of the company.

And as any succeeding step in the prosecution of the enterprise, subsequent to the location and to be taken on the land, might, and perhaps we may say would, naturally be an entry for purposes and uses of this exclusive character, amounting to an actual beginning of the work of construction, and an assertion of ownership (*Sedgwick Const. Law*, 526), we may concede, with some straining, it must be confessed, of language and of the rules of construction, that the words, "entered upon for railroad purposes," in the supplemental answer may be held equivalent to "entered upon and taken," as used in the charter, and that the commissioners, in valuing the land as of November 1, 1866, would be acting in pursuance of the authority given them by it.

Supposing, however, that this is so, it is still evident that, if the provisions of the charter, that the company shall have full power and authority, after such entry and taking, to retain possession till the final determination of the proceedings, and until, after demand made, it shall have refused to pay the value of the land so ascertained, be legal so that its entry aforesaid and possession since have been rightful, it is utterly immaterial whether any tender or award has been made, or any commissioners appointed to make any award.

If such entry and possession were lawful in the outset, then, inasmuch as the institution of proceedings for the appointment of commissioners is left to

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the company, the fact that none have been appointed renders such possession no less lawful in 1869 than it was in 1866.

Is not such lawful possession since November 1, 1866, a complete defense to this action, which is in the nature of an action of trespass? If it be, is not such defense made out by the allegations in the original answer that the defendant entered on said strip for railroad purposes, as by law it was authorized to do, and necessarily did the acts complained of in fitting it to be used for such purposes, and in constructing and operating their road thereon? If so, are not the facts alleged in the supplemental answer entirely immaterial under these pleadings? It would seem so, certainly.

But it has been heretofore decided by this court, that these provisions of defendant's charter to the contrary notwithstanding, it had no right, without making or securing compensation therefor, to take and use private property in this way. *Gray v. First Division St. Paul, &c. R. R. Co.*, 13 *Minn.* 315. That is to say, the said provisions of the defendant's charter, in so far as they purport to authorize such use, are unconstitutional and void.

The acts of defendant done on plaintiff's land since November 1, 1866, being without authority of law, have therefore been a continuing trespass. So considered, it is obvious that this award and tender would be no defense to this action, brought to recover damages therefor. The defendant's position in this respect is, that the award covers all the items of damage that could be claimed in an action of trespass, and also all the damage sustained by the entire farm or tract out of which the land is taken, and also the value of the land taken.

But this is certainly not true, if the charter provides for an appraisement of the value of the land

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taken, and for nothing more, according to its literal meaning. § 13. The value of the strip taken, by itself, is of course no measure, in the nature of things, of the injury which plaintiff may have sustained, in respect of the property of which it formed an integral part, by reason of such entry and use. *Winona, &c. R. R. Co. v. Denman*, 10 *Minn.* 267. Moreover, it is an obvious deduction from the doctrine of that case, that nothing short of compensation will satisfy the requirements of the constitution of the United States, that private property shall not be taken for public use without just compensation, and that the mere value of the strip taken can not be that compensation, that this clause of the charter, if it means that defendant may acquire the land by paying its value and nothing more, is altogether illegal, and an award under it could be no defense. 1 *Redf. on Railways*, ch. 11, § 2, 64.

But it may be said, that it will not do to overlook that wider meaning of the word "value," which may be contended for. If, instead of its literal signification, it should be held rather to mean the value of the strip taken to the owner, that is, to any person owning the same under the same circumstances as the present owner, it is obvious that other elements than its value, by itself or by the acre, would enter into the appraisal, going, with such value, to make up that compensation, to which the owner is entitled. Its value to him might, for instance, consist in part in connecting the residue of the tract, out of which it is taken, and by reason of which taking the tract becomes no longer one, but two separate tracts, and this might be an element of value, contemplated by the charter.

If this be the correct construction of the word, an appraisal of the value, so understood, of the land on November 1, 1866, might, if then paid or secured, have amounted to compensation, in the constitutional sense,

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for the taking at that date. But how can an award thereof, made in 1870, be, in any sense, a defense to this action, which is brought to recover damages for the unauthorized use of plaintiff's property since November 1, 1866.

But it may be said that the commissioners have awarded interest on the value so estimated, and that this covers such damages. But the charter makes no provision for their including interest in their award. An estate in fee in the land taken is to vest in the company upon payment or tender of the value of the land taken.

The commissioners have apparently, without authority, undertaken to award such interest as compensation for an unauthorized continuing trespass on plaintiff's land since November 1, 1866. The sum may be sufficient, but they have no more right to fix its amount, than defendant itself.

Whatever view, therefore, be taken of the rights and liabilities of defendant, the facts pleaded in the supplemental answer are wholly irrelevant to the issue.

These observations apply to the injunction prayed for. If defendant may lawfully retain possession till the final conclusion of these proceedings, and its refusal to pay on demand what is awarded, or, if an appeal be taken, what may be finally assessed on appeal, no injunction can issue, whether an award has been made or not. If, on the other hand, the provisions of its charter, purporting to give it that right, are ineffectual to that end, and it has no right to take and use plaintiff's land until it has made or secured just compensation therefor, it is evident that the mere fact, that an award has been made and that defendant is ready to pay the sum awarded, is no more material, to prevent an injunction, than the fact, that commissioners had been appointed to make one, which, and

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their speedy procedure in the business of their appointment, appear by the original answer. For, if the value of the land, appraised by the commissioners or assessed by a jury, be compensation for the private property so taken, so that, upon payment, the land might become defendant's property, and its possession consequently lawful, it can in no event become so by a tender of the sum awarded by the commissioners before the time for appeal expired. Plaintiff could not, in any conceivable case, be divested of his property, by a tender of that sum sooner made; and it appears that the award was made May 3, and the motion for leave to file this supplemental answer May 9, 1870. On the other hand, if the value of the land as appraised is not such compensation, an award and tender thereof could never give defendant any right in the premises, whether an appeal had been taken and determined or not.

Order affirmed.

HARRINGTON v. THE ST. PAUL & SIOUX CITY
RAILROAD COMPANY.

17 *Minnesota*, 215.

Supreme Court of Minnesota; July Term, 1871.

Trespass upon lands. Pleading. Where, after an action is commenced against a railway company for injury to lands of the plaintiff, part of the land is sold and conveyed by the plaintiff, the defendant can not avail itself of that fact as a defense unless it be set up by supplemental answer.

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In an action against a railway company for unlawfully constructing and operating its road over plaintiff's land, it is no defense that, before the plaintiff became the owner of the land, the defendant had entered upon the land and located and marked out the line of its road thereon.

In such an action, evidence that the location and operation of the railroad increased the hazard of fire to the plaintiff's buildings is admissible.

Compensation for lands taken for railway purposes. Highways. In Minnesota, the owners of lands abutting upon streets in a town own the fee in such streets to the center thereof, subject to the public easement for a highway, whether a statutory or common-law dedication of such streets be shown; and the legislature can not appropriate the street to any other use, or subject the land to any additional servitude, such as using the street for a railroad, without compensation to the owner of the fee.

Highways. Injunction. The construction and operation of a railroad over a public street, the fee of which is in the owners of the lands abutting upon such street, without compensation to them, constitutes a private nuisance as to such owners, and such acts of the railway company may be restrained by injunction.

An application for an injunction in such a case will not be refused on the ground that there is an adequate remedy at law under the provisions of the charter of the railroad company for awarding compensation for lands taken, if such proceedings are authorized to be instituted by the railroad company only, and not by the land owners. Nor can the land owners, by mandamus, compel the railroad company to institute such proceedings.

Where, in such a case, a perpetual injunction would have occasioned great inconvenience to the public, as well as to the railroad company, and the company might still proceed to obtain the right of way upon making compensation therefor,—*Held*, that judgment should be entered that an injunction do not issue if the defendant should forthwith institute proceedings to obtain the right of way, and promptly prosecute the same; otherwise to be considered as granted as of the date of the judgment.

Appeals to the supreme court of Minnesota from the district court of Blue Earth county.

These were four several actions brought by Lyman C. Harrington, Sarah E. Comstock, Elizabeth Copp,

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and Stella M. Davies, respectively, against the St. Paul & Sioux City Railroad Company, for injuries to certain lots in the city of Mankato, owned by the plaintiffs respectively.

The complaint in each case, after showing plaintiff's ownership of the premises therein described, and of the street in front of such premises to the center line of such street, alleged that in the fall of 1868, the defendant unlawfully entered upon that portion of plaintiff's premises included in such street, and began the construction of its railroad thereon, completing the same in the summer of 1869, and that the defendant has operated the said road so constructed on said premises until the commencement of the action, and unlawfully withholds from the plaintiff the possession of that part of the premises so occupied by it; "that plaintiff has been greatly damaged by the said unlawful acts of the defendant, and by the unlawful withholding of the possession of said premises up to the time of the commencement of this action, to wit: to the amount" stated in the complaint, and without compensation paid or secured to the plaintiff for such damage.

The relief demanded in each complaint is, 1. Judgment for the possession of the premises so occupied by the defendant; 2. The plaintiff's damages suffered up to the time of the commencement of the action by the wrongful acts of the defendant upon plaintiff's premises, and by the wrongful withholding of the same; 3. An injunction restraining the defendant from maintaining its railroad, &c., upon said premises.

The actions were tried by the court, without a jury, and in each case judgment was entered for the plaintiff for the relief demanded in the complaint, the damages being assessed by the judge who tried the case, upon evidence given at the trial. From

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the several judgments thus entered the defendant appealed.

Brisbin & Palmer, for the appellant.

Davies & Dickinson, and *James Brown*, for the respondents.

RIPLEY, Ch. J.—These cases were argued together, but questions arise in some which do not in all. We will dispose of the former first.

In the case of Comstock, the complaint alleges ownership in the plaintiff of block No. 11, in Van Brunt's addition to Mankato, having a frontage of two hundred and ninety-two feet on Van Brunt street, over which defendant's road is constructed, as to which the answer denies any knowledge or information sufficient to form a belief.

At the trial plaintiff proved that, on January 25, 1868, the then owner conveyed the block to her in fee. A witness called for plaintiff testified on cross-examination (the plaintiff objecting thereto as immaterial and irrelevant, but which objection was overruled by the court), that "a portion of this property has been sold since the suit began; warranty deed; one hundred and fifty feet front on railroad has been sold, running west from north-east corner."

The court finds, as matter of fact, that plaintiff, ever since the said January 25, has been the owner in fee simple and in possession of said premises; that, by reason of the acts of defendant complained of, she has sustained damage to the amount of twenty-five dollars, and, as conclusions of law, that she is entitled, besides such damages, as against defendant, to recover possession of the tract of land, lying between her said block and the center line of said street, as occupied by

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defendant, and to a perpetual injunction as prayed in the complaint.

The defendant objects that "the testimony (meaning the plaintiff's testimony generally), applies indiscriminately to the whole property; and the finding of damages relates to the whole property; so of the recovery of the possession and the injunction. This we claim to be error affecting the action for which a new trial should be awarded."

As to the testimony, no objection was made to any of it, at the trial, for the reason now alleged. Its reception, therefore, can be no ground for a new trial.

With respect to the other ground of objection it is to be considered, that, even if the plaintiff had sold the whole block since the commencement of the suit, the fact must be alleged by way of supplemental answer before evidence of it would be admissible. 1 *Ch. Pl.* 657; *Minn. Gen. Stat.* ch. 66, § 108; 7 *Johns.* (N. Y.) 194; 20 *Id.* 414; 1 *E. D. Smith* (N. Y.) 273; *Rundle v. Little*, 6 *Q. B.* 174. Defendant could not, therefore, avail itself of any statements of this character elicited on cross-examination against plaintiff's objection.

With respect to the damages it is also to be observed, that the right to recover damages for trespasses, committed prior to a conveyance of the land, would not pass by the deed. Plaintiff might nevertheless recover a judgment therefor. *Minn. Gen. Stat.* ch. 75, § 4. To lay the foundation, therefore, for an objection, that the finding included subsequent damages, the date of the sale should, at all events, have been definitely fixed.

In the case of *Stella M. Davies*, on the other hand, her right to recover damages or other relief is objected to, on the ground that it had accrued to her grantor before her purchase, and that, therefore, she bought *cum onere*.

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The argument is, in brief, that the lands had been previously taken for public use, and the right to damages accrued and took effect then, to the then owner. This confounds a taking of private property for public use by proceedings according to law, with an unauthorized trespass.

If the theory on which plaintiff recovered be correct, as it is not pretended that defendant has ever taken any steps to condemn her land, it has been appropriated to defendant's uses in the maintenance and operation of its railroad thereon without any authority of law whatever, and defendant in so doing is a trespasser. The damages claimed and given in this action are not assessed as compensation for plaintiff's land taken for public use, but for such unauthorized acts.

Defendant's acts, moreover, are a continuing trespass. Plaintiff's grantor, no doubt, might maintain an action against defendant for damages sustained up to the conveyance to plaintiff; but plaintiff also has her remedy for those which she has sustained since. Whether defendant had such a possession prior to the deed to plaintiff, as that her grantor could have maintained ejectment, is nothing to her. If so, and he did not see fit to, she may, if the defendant continues its unlawful possession. So, if the defendant's acts are a nuisance, it is no answer to say they were a nuisance to her grantor also. She may have an injunction, though he did not see fit to obtain one. *Minn. Gen. Stat.* ch. 75, § 25.

An insurance agent, called as a witness for plaintiff, was allowed to testify, the defendant objecting, that the location and operation of the railroad increased the hazard of fire to plaintiff's buildings.

The defendant cites, in support of the exception taken to the admission of the evidence, two Pennsylvania decisions to the effect, that such increased risk

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is not proper to be considered in estimating the compensation to be paid for land taken by a railroad company under its charter. Without discussing that question it is enough to repeat that this is no such proceeding; that if defendant's road was a nuisance as respects plaintiff, she was entitled to relief. Such an increased risk certainly interfered in the most direct way with the plaintiff's comfortable enjoyment of her property, and was therefore competent to prove the existence of such nuisance. *Minn. Gen. Stat.* ch. 75, § 25.

Mrs. Elizabeth Copp's premises are a part of the town site of Mankato, lots one (1) and three (3) in block fifty-nine (59) in Mankato, according to Brewer's plat thereof, and front on Fourth street.

To her claim to the ownership of the fee to the center of said street in front of her said lots, subject only to the public easement therein for a highway, it is objected, that by the act of Congress, under which said town site was entered, and by the act of the legislature, she acquired under the deed to her from the trustee no title to any part of the street; that the title to the street remained in the trustee.

We see no reason why the trustee's deed to plaintiff did not pass to her the legal title to the fee of the land to the center of the street adjoining her lots, as in the ordinary case of conveyance of lands adjoining a highway.

The lands comprising the town site of Mankato, were entered by the judge in trust for the several occupants thereof, according to their respective interests; that is, all the lands comprised in said town were so held. If any occupant had theretofore dedicated any part thereof to public use as a street, the judge would hold the title to such land in trust for him, subject to such easement in the public.

The judge finds, that plaintiff was one of such

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occupants, and also finds facts, from which a dedication of the streets, delineated on Brewer's plan, to public use by the occupants of the town site, would be inferred.

What occupant, other than plaintiff, could have dedicated the portion of said street to its center, adjoining the lots in question, is not conceivable on these findings.

The law, *Minn. Comp. Stat.* 385, made it the trustee's duty to convey the title to any lot to the person entitled thereto, according to his right or interest in the same, as it existed at the time of entry, and the judge finds that the trustee duly conveyed the title in fee to said lots to plaintiff.

Prior to said deed she must, therefore, have been, as one of the occupants of said town site, the occupant of said lots.

The streets must have become such by dedication by those who, before such dedication, were the several occupants of the whole town site, and who, after such dedication, remained in the exclusive occupation respectively of the several lots and parcels of land fronting on or adjoining said streets; as to which streets they had parted, as against the public, with any right of occupation inconsistent with the public easement.

If there was a dedication of this street, it must then have been a dedication by the occupants of the lots fronting thereon, each of so much, to its center, as adjoined their lots respectively, unless we suppose, without evidence, and contrary to all probability, that the strip of land constituting the street was settled on and occupied in that shape prior to any division of the town site into lots and blocks.

It follows from what has been said, that plaintiffs' title by occupancy gave her a right to a conveyance in fee of her lots and of the street in front thereof, as aforesaid, subject to said easement.

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If she had bought the lots and the street in front thereof, subject to the public use, by a contract which stipulated therefor in so many words, a conveyance of the lots would have executed the bargain, for it would have passed the fee in the street. The judge held the lots and street in trust for her. Why should not his deed of the lots be held to execute his trust as to this street also?

The objection, that by the act of Congress of March 3, 1857, granting the right of way over the public lands to the railroads then contemplated, and by the territorial act of May 22, 1857, disposing of the land grant, the defendant acquired a prior right to that of plaintiff, overlooks the settled doctrine of this court, that the rights of the occupants of the town site, were fixed at the date of the application and submission of proof to enter it, viz.: March 21, 1856, and that the judge, to whom the patent was issued, became thereby seized of said town site, in trust for the occupants thereof at that date. 3 *Minn.* 119, 448; 6 *Id.* 119; 8 *Id.* 456; 15 *Id.* 123.

As to the act of Congress of August 4, 1852, granting a right of way through the public lands, it is further to be observed that its effect is expressly limited to lands held for private entry and sale and unsurveyed lands, which, at the date of the act extending its provisions to the territories, did not include this town site. 10 *U. S. Stat. at L.* 28, 683.

No such question arises in the other cases, which all present the ordinary case of lots adjoining on streets, dedicated as such by those under whom plaintiffs' claim.

In respect to all the lots, whether a statutory or common-law dedication of the streets adjoining the premises of the plaintiffs respectively were shown, it is the doctrine of this court, that they own the fee therein to the center thereof, subject to the public

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easement for a highway; and as to all the cases, the doctrine of this court is, that the legislature could not appropriate the street to any other use, or subject the land to any additional servitude, without compensation to the owner of the fee; and that the use by the defendant of said street for a railroad would be such additional servitude. *Schurmeier v. St. Paul, &c. R. R. Co.*, 10 *Minn.* 82; *Winona v. Huff*, 11 *Id.* 134; *Mankato v. Willard*, 13 *Id.* 1; *Gray v. First Division St. Paul, &c. R. R. Co.*, *Id.* 315.

It seems that the defendant, claiming the right to do so, under the laws referred to, and an ordinance of the city of Mankato, entered on said streets for the purpose of constructing its railroad thereon, and did so construct it along and upon the same, in front of said lots, and has ever since operated the same as such, running trains on the same daily; and it is found, by the court below, that the defendant has never made plaintiffs any compensation, nor has it ever taken steps to have commissioners appointed to appraise the plaintiffs' damages, and all of said acts have been done without plaintiffs' consent, and against their will; that the said railroad and use thereof are an obstruction to the plaintiffs' use of their said premises and comfortable enjoyment thereof, and will continue so to be, so long as it remains; that they render the street unsafe for travel, and access to plaintiffs' premises inconvenient and dangerous; that they have greatly diminished the value of said property; that they work an injury to plaintiffs in obstructing said street and the free use of the same in connection with their said premises, distinct and different from the injury sustained by the public generally.

On these facts and findings there can be no question, under the decisions of this court, but that in thus appropriating said street to the use of its railroad, the

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defendant is a trespasser in respect of plaintiffs, and that its acts constitute a private nuisance as against plaintiffs, entitling them to an injunction. 1 *Redf. on Railways*, ch. 11, §§ 81-2; 10 *Minn.* 82; 13 *Id.* 315.

But the granting this relief is objected to on two grounds:

First. It is said that equity interferes in no case where there is an adequate specific remedy; that is to say, in the defendant's application of that principle to this case, it will not restrain the defendant from operating its road upon plaintiffs' land, when its charter provides a mode for plaintiffs to obtain an appraisal of compensation, and they have not resorted to it.

The first difficulty in defendant's way is, that its charter provides no mode whereby the land-owner may obtain compensation for the taking. The defendant may apply for commissioners to appraise the compensation to be paid for such lands as may be designated in the application, and proposed by defendant to be taken (*Minn. Sess. Laws of 1857*, ch. 23, § 5), but of a means whereby the land-owner may, at his own instance, obtain compensation for the taking of his land, there is not a word.

This the defendant answers by saying, that, though the initiative is with the defendant, the remedy is intended for both parties, and defendant may be required by mandamus to set it in motion.

It seems that in England, after notice given to treat, which is regarded as an inchoate purchase, mandamus lies to compel a corporation to proceed in the appraisal of damages. 1 *Redf. on Railways*, ch. 23, § 155.

But we are unable to see how, by reason of the defendant having trespassed upon plaintiffs' premises, the law specially enjoins on it a duty to proceed and take and pay for the same in the way provided in its

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charter, as a duty resulting from any office, trust, or station of defendant, without which mandamus does not lie. *Minn. Gen. Stat.* ch. 80, § 2.

The law makes it liable in damages for such unlawful acts, and, if they amount to an ouster, plaintiffs can maintain ejectment to recover possession; and, in case of a nuisance, they can have such nuisance abated, and an injunction. Wherefor another reason appears why mandamus will not lie, viz.: that for the injury which plaintiffs suffer, there is a plain, speedy, and adequate remedy in the ordinary course of law. *Minn. Gen. Stat.* ch. 80, § 3; ch. 75, § 25. Injunction, we think, is intended in the expression, "the ordinary course of law," which here refers, in our opinion, to remedy by civil action, as distinguished from a special proceeding like mandamus. But it is said,

Secondly. That an injunction will not be granted, because the plaintiffs, with full knowledge of defendant's intentions and acts, slept on their rights, until defendant had completely constructed and is operating its road, before bringing these suits; that if a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while that act is in progress, he can not afterwards complain; that is, that a court of equity will leave him to his remedy at law. *2 Redf. on Railways*, ch. 29, § 220.

Without undertaking to question the correctness of the latter branch of this position, in its application to the right to the interference of equity by injunction *pendente lite*, before the plaintiff has established his legal right, or where it is not admitted; in all cases, at least, in which the appropriator supposed that he was in the exercise of his right (*1 Redf. on Railways*, ch. 10, § 61; *Ramsden v. Dyson*, *Law Rep.*, 1 *House of L.* 129), it is not applicable to the present cases.

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In these cases a perpetual injunction is prayed as part of the relief to be given by the decree. The plaintiffs' rights are established by the finding of the court, that the defendant's railway is a nuisance, in which case they may by statute have such injunction, as well as an abatement of the nuisance and a recovery of damages. *Minn. Gen. Stat.* ch 75, § 25.

The court also finds that defendant's acts are without plaintiffs' consent and against their will, nor is there anything in the cases to rebut the presumption that defendant knew that its acts were unauthorized by law, and that it was trespassing on plaintiffs' premises.

The cases, then, are simply cases of willful nuisance, and of delay on plaintiffs' part to sue, until defendant had been operating its road for some months.

We think this is very clearly no bar to relief by a perpetual injunction as adjudged by the court below.

In cases like these of continuing trespass, where every day gives plaintiffs a fresh cause of action (having at the same time their remedy by action for past trespasses), the propriety of preventing multiplicity of suits, by forbidding further trespasses, can hardly be affected by the fact, that plaintiffs made no application for an injunction to prevent such past trespasses.

To leave plaintiffs to their remedy at law, is the means of bringing about the very multiplicity of suits, which equity will prevent by injunction. *McRoberts v. Washburne*, 10 *Minn.* 23; *Livingston v. Livingston*, 6 *Johns. (N. Y.) Ch.* 497.

Inasmuch, however, as the statute referred to contemplates the existence of the nuisance before the beginning of the action, in which by the judgment the plaintiffs may have an injunction, mere delay would seem clearly to be no objection to such statutory

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relief, and therefore it is in this case properly granted.
1 *Paige*, N. Y. 97.

In *Gray v. First Division St. Paul, &c. R. R. Co.*, 13 *Minn.* 316, the complaint alleged, that before the commencement of the action, the defendant had fully completed and was maintaining its railroad on plaintiff's premises, running its engines and cars daily over the same, and prayed judgment for damages and an injunction, and was sustained on demurrer.

In New York, in a suit, the object of which was to obtain a perpetual injunction to restrain the New York Central Railroad Company from continuing to use and occupy with its railway a part of a street in Syracuse which had been dedicated by plaintiff to the public use, and on which the railroad had been constructed without plaintiff's consent or compensation to him, and operated for several years, before the suit was brought for an injunction and to recover damages for such past occupation, it was held, that though plaintiff had a remedy at law for the trespass, yet, as it was of a continuous nature, he had a right to come into a court of equity and invoke its restraining power to prevent a multiplicity of suits. See also *Craig v. Rochester City, &c. R. R. Co.*, 39 *N. Y.* 404.

If the resulting inconvenience to defendant from such injunction will be great, it might have proceeded, according to law, to obtain the right of way, by making compensation to plaintiffs.

This, however, it may still do, though it can not thereby deprive plaintiffs of their right to recover the damages sustained by such past trespasses.

In some cases, however, the court, on account of the great injury and inconvenience from stopping the works, have refrained from issuing an injunction, provided the company undertakes to do that which the court decides it is bound to do. *North British R. R. Co. v. London, &c. R. Co.*, 1 *Railw. Cas.* 653 · *Drewry*:

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on *Inj.* 292; *Jones v. Great Western R. Co.*, 1 *Railw. Cas.* 684.

Thus, where the company had no right to take plaintiff's land, except upon terms of paying therefor at a fixed rate per acre, and for collateral damage according to the extent of it, no injunction was granted, the company undertaking to go before a jury to have the collateral damage assessed; but if it did not promptly act, on the order therefor, the injunction should be considered as granted on the day on which that order was made. *Jones v. Great Western R. Co.*, *supra*.

It seems to us that this is a precedent proper to be followed in cases like the present, in which a perpetual injunction might occasion great inconvenience to the public, as well as the defendant, before the right of way could be obtained pursuant to law; and that the judgment to be entered on the findings be, in respect to the injunction, that it do not issue, if defendant forthwith institutes proceedings to condemn the land, and promptly prosecutes the same; otherwise to be considered as granted as of the date of the judgment.

The allegations of damage in the complaint are sufficient, and the evidence was sufficient upon which the court below might arrive at a conclusion as to the amount of damages sustained. The judge was put in possession of all the elements of injury, none of which were such as experts alone would be qualified to pass upon, and was, therefore, competent to form his own opinion as to the specific sum in which plaintiffs were damaged thereby.

The defendant introduced a certain ordinance of the city of Mankato to show that the municipal authorities had authorized the defendant to construct and operate its road over the streets in question, and plaintiffs were permitted to give in evidence in rebuttal, defendant objecting, certain proceedings,

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and another ordinance of the city council, and defendant excepted. Whether these exhibits were, as defendant insists, immaterial and incompetent, we need not consider. The city charter, which the defendant gives in evidence, provides, that no right, title, or interest in or to any street, levee, park, public ground, or square in said city, shall be granted, conveyed, released, or discharged by the common council, unless the same shall have been submitted to a vote of the legal voters of the city, and be adopted by them at an annual or special election. If, therefore, the city had owned the fee of the streets in question, no such grant as the defendant claims to have from the common council would be effectual without such vote; and the defendant, so far from showing any, admitted that none such had been had.

The ordinance on which it relied, being, therefore, ineffectual to confer such right, the fact that the evidence offered to rebut it was incompetent for that purpose, is no ground for disturbing the decision.

It is further to be observed that if the fee was in the plaintiffs, the city council, no more than the legislature from whom its powers are derived, could, even by vote of the citizens, confer upon the defendant the right to take plaintiffs' property therein without compensation. 39 *N. Y.* 404; 16 *Id.* 97; 10 *Minn.* 82 13 *Id.* 315.

Judgment affirmed, with the above modification in respect of the injunction.

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THE CONHOCTON STONE ROAD v. THE BUFFALO, NEW YORK, & ERIE RAILROAD COMPANY.

51 *New York*, 578.

Commission of Appeals of New York; March Term, 1873.

Injuries to real property. An action to recover damages from a railway company for injuries to the plaintiff's land, resulting from the land being flooded by water dammed by an embankment and bridge of the defendant's railroad, constructed by a former owner of such railroad, before conveyance to the defendant, can not be sustained by proof merely of the continuance of the structure by the defendant. Notice or knowledge of its existence must also be shown. But a request to abate the nuisance is not necessary.

Appeal to the commission of appeals of New York from the general term of the supreme court in the eighth judicial district.

This was an action by the Conhocton Stone Road against the Buffalo, New York, & Erie Railroad Company, to recover damages for injuries to the plaintiff's road. The complaint alleged that the injury was caused by the road bed being washed and flooded by a stream which had been so dammed by an embankment and bridge constructed for the defendant's railroad, as to produce the flood and resulting injury, in the years 1864 and 1865.

Upon the trial it appeared in evidence that the embankment and bridge were constructed by the Buffalo & Conhocton Valley Railroad Company in 1851 or 1852; that the name of this company was, in 1852,

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by an act of the legislature, changed to the Buffalo, Corning, & New York Railroad Company; that the defendant was created a corporation in 1857, and in that year, on a foreclosure sale, bought the railroad and franchises of the last named company, and still continued to own the same. In February, 1863, the defendant leased its road to the Erie Railway Company for the term of four hundred and ninety years, including all its equipments and rolling stock, and that company took possession thereof under the lease on May 1, in the same year, and still continued in possession. The lease provided for the payment of an annual rent by the lessees, in equal monthly payments. The right of re-entry was reserved to the defendant, and the lease contained stipulations in regard to repairs to be made on the road. The road had been constantly used and operated since its completion.

The defendant, after the introduction of that evidence, moved for a nonsuit on the following grounds:

"1. That, by the evidence already adduced, the plaintiff has failed to prove that the defendant erected the embankment and bridge, or either of them, as alleged in the complaint.

"2. That the nuisance, if any, had not been erected by the defendant, but merely continued by them, as they found it, and that, therefore, the plaintiff must allege and prove notice to the defendant of the existence of such nuisance, the extent of it, and request to abate or remove it before the action could be brought.

"3. That the defendant did not continue the nuisance after May 1, 1863, it having leased its road and surrendered possession thereof to the Erie Railway Company on that day, and has had no control of the road, or any part thereof, since that time,

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and, therefore, no power to abate or remove this nuisance."

The court denied the motion for a nonsuit, and the defendant excepted. A verdict was rendered for the plaintiff, and the exception was ordered to be heard in the first instance at general term; and judgment was in the meantime suspended. The general term directed judgment for the plaintiff upon the verdict; and the defendant appealed.

John Ganson, for the appellant.

George B. Bradley, for the respondent.

LORT, Ch. C.—The exception taken to the denial of the motion for a nonsuit presents the question whether a grantee of real estate, on which a nuisance had been erected, before its conveyance to him, by a previous owner, and which was merely continued as it was at the time he acquired title, can, without any previous notice of its existence, and a request to abate it, be held liable for damages subsequently resulting therefrom, during the continuance of his ownership.

The subject has been fully considered by courts in England, and in several of our sister states; and the rule deducible from their decisions is laid down in *Angell on Watercourses* (6th, or Perkins' edition) to be, that an action on the case for a nuisance lies both against the person who originally committed it, and against the person in the occupation or possession of the premises who suffers it to continue, for the reason that the continuance of that which was originally a nuisance is a new nuisance (§ 402); but as the purchaser of land might be subject to great injustice, if made responsible for consequences of a nuisance of which he was ignorant, and for damages which he never intended to occasion or continue, it has been

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held ever since Penruddock's Case, 5 *Rep.* 101, that where a party was not the original creator of the nuisance he must have notice of it, and a request must be made to remove it before any action can be brought. No particular form of notice or request is required. It may be either written or oral (or it may be by acts done), clearly informing the party to be affected by it of the existence of the nuisance, and of the desire of the party injured to have it removed, so that the person to whom it is addressed shall fully understand the ground of complaint, and that the party giving it is unwilling to have it continue. §§ 403 and 403 *a*.

In Penruddock's Case, above referred to, it was resolved by all the judges that, although the continuance by a feoffee of a nuisance erected by his feoffor was a new wrong, yet a *quod permittat* would not lie against him without a request made to reform it. This principle has been sustained and recognized by the decisions in the following among other cases: *Brent v. Haddon*, *Cro. Jac.* 555; *Winsmore v. Greenbank*, *Willes*, 583; *McDonough v. Gilman*, 85 *Mass.* (3 *Allen*), 264; *Johnson v. Lewis*, 13 *Conn.* 303; *Dodge v. Stacy*, 39 *Vt.* 560; *Pillsbury v. Morse*, 44 *Me.* 154; *Plumer v. Harper*, 3 *N. H.* 88; *Woodman v. Tufts*, 9 *Id.* 88-91; *Carleton v. Redington*, 2 *Id.* 291; *Id.* 311; *Eastman v. Amoskeag Manuf. Co.*, 44 *Id.* 143; *Pierson v. Glean*, 2 *Green (N. J.)* 36; *Beavers v. Winner*, 1 *Dutch. (N. J.)* 96, 101; see, also, 1 *Chitty Plead.* 71 and 77, 2nd. ed. ; 2 *Id.* 381, note *p*.

In *Winsmore v. Greenbank*, *supra*, decided in 1745, *WILLES*, Lord Chief Justice, in speaking of the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of his neighbor, says: "That against the beginner an action may be brought without laying a request to remove the nuisance; but that

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against the continuer a request is necessary, for which Penruddock's Case, 5 *Cro. Jac.* 100, 101, was cited, and many others might have been quoted. The law is certainly so, and the reason of it is obvious."

It was said by the court in *Dodge v. Stacy*, *supra*, decided in 1867: "We regard it settled by the authority of well adjudged cases that when the action is brought against the grantee of one who has erected obstructions, it can not be maintained without previous notice to the defendant to remove them;" and added that the point was clear on principle and on authority.

Chief Justice HORNBLOWER, in *Pierson v. Glean*, *supra*, after citing Penruddock's Case, said that the law, as settled by it, had not, as he believed, been seriously questioned since; and then after referring to the remark of Lord Chief Justice WILLES, in *Winsmore v. Greenbank*, above quoted, and other authorities, concluded his opinion, on deciding a demurrer to an answer by a defendant, setting up as a defense to an action for damages resulting from a nuisance that it had been erected before he had acquired title, and that he had never been requested to reform or remove it, by saying, "As well, then, upon the good sense and common justice of the case, as upon the ground of venerable and unquestioned authority, I am of opinion that the demurrer should be overruled."

I do not find, nor have I been referred to any decision in this state, on the distinct question now under review.

There are several cases reported in which the general doctrine stated in *Blackstone's Commentaries*, vol. 3, p. 220, is asserted, that "every continuance of a nuisance is held to be a fresh one," but the statement, construed in connection with the context, evidently has reference to its continuance by the same party;

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and where persons succeeding to the ownership of land on which a nuisance had previously been erected, have been held liable for damages resulting from its subsequent continuance, it appears either that it was after notice of its existence, or that the question of such notice had not been raised at the trial. The case of *Brown v. Cayuga, &c. R. R. Co.*, 12 *N. Y.* (2 *Kern.*) 486, was one of the latter class, and in that of *Irvine v. Wood*, 51 *N. Y.* 224, decided by this commission in September, 1872 (which was for special damages resulting from a public nuisance), the fact was shown that the defendant Wood had knowledge of its existence and had availed himself of it, so that he was fully cognizant of it and of the consequences that might result therefrom.

There are, however, two cases reported, in which the question was discussed by able and eminent jurists, Judges DENIO and S. B. STRONG, entertaining different opinions, and the high estimation and respect to which that of the former is always entitled, adverse to the rule in England and in sister states, to which I have referred, has caused a hesitation and doubt in adopting it, and has led me to examine the ground on which he reached his conclusion.

The case in which Judge STRONG's views are expressed is that of *Hubbard v. Russell*, 24 *Barb.* (*N. Y.*) 404, decided in 1857. It involved the question, but it did not become necessary to decide it, because it was held that the plaintiff had proved or offered to prove sufficient to infer a request to discontinue the nuisance.

The opinion of Judge DENIO was given, in *Brown v. Cayuga, &c. R. R. Co.*, *supra*, before that of Judge STRONG, but was not referred to by him, and probably had not been brought to his attention; and it is important, in considering what effect or weight should be given to that of Judge DENIO, to notice the fact

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that the question was confessedly not presented in the case in which it was delivered ; and Judge A. S. JOHNSON, who gave the prevailing opinion in it, said that it was to be considered as if the requisite proof of a request to remove the nuisance had been given ; it is also stated by the reporter that the court did not pass upon the question whether the defendant was liable, without notice, to remove the obstruction complained of.

The learned judge in speaking of and commenting upon Penruddock's Case, as that in which "the doctrine seems to have originated," said, and correctly, that it "was a *quod permittat*, a form of action in which the successful plaintiff obtains a judgment not only for the damages, but for the abatement or destruction of the thing which is claimed to be a nuisance ; and it was held that such an action might be brought against him who did the wrong, without any request made, but that it could not be brought against his feoffee without a previous request to remove the nuisance." He appears to concede the propriety and justice of the rule as applicable to that particular form of proceeding, but claims that the reason for it does not apply to an action on the case. He says : "The remedy sought by a *quod permittat* involves an interference with the defendant's real estate, which it is reasonable he should have an opportunity to do himself before an authority is given to another to do it." It is true that such an interference might follow ; Blackstone, in his Commentaries (vol. 3, p. 221), says it was "a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosterndre*, the nuisance complained of, and unless he so permits, to summon him to appear in court and show cause why he will not ; and this lies as well for the alienee of the party first injured as against the alienee of the party first injuring, as has

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been determined by all the judges; and the plaintiff shall have judgment herein to abate the nuisance and to recover damages against the defendant;" but it is apparent from the object of the writ, as thus stated, that there was much more reason for requiring a notice of the existence of a nuisance to be given to a party who might not have any knowledge of it and ask him to remove or abate it before he should be mulcted in damages, to which he would be liable for injuries resulting therefrom, and which he had no reason to anticipate, than to be called on by the requirement of the other relief sought to be obtained, being a permission to the plaintiff to abate the nuisance. The service of the writ on the defendant would give him an immediate opportunity to abate it himself; and it would doubtless have been a sufficient answer, on his appearance in court in obedience to the summons to show cause why he would not permit the plaintiff to do it, to return and state the fact that he had himself since its service abated or removed the cause of complaint, and that he, previous thereto, was wholly ignorant and uninformed of its existence. He would, nevertheless, if the views of the learned judge are correct, be held liable for damages which had resulted without any actual fault on his part.

Three other authorities, and only three, appear to have been cited as sustaining the requirement of a notice; at least no more are referred to by the judge. One was the case of *Tomlin v. Fuller*, 1 *Mod.* 27, which he properly said turned upon the particular nature of the right which the plaintiff had to the use of a passage which the defendant had obstructed, in which *TWISDEN, J.*, in speaking of it, said, "wherefore, it seems, he ought to have laid a request," and that the defendant might have demurred, but he held that it was cured by the verdict. That was, moreover, an action against the party who closed or shut the

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passage, and did not sustain the principle for which it was cited. Another case was that of *Salmon v. Bensley*, *Ryan & M.* 189; 21 *Eng. Com. Law*, 414. It was a *nisi prius* case, involving a question of evidence in an action against an occupier merely of the property, and in truth clearly not any authority in support of the doctrine involved in this action, and I doubt whether the decision on the question actually presented was correct.

The other case was *Johnson v. Lewis*, 13 *Conn.* 303, *supra*, which was disposed of by the remark of the learned judge that, "on the authority of *Penruddock's Case* and of *Tomlin v. Fuller*, the supreme court of Connecticut held that, in a case like the present, the plaintiff could not recover in case against one who continued a nuisance without proof of notice to the defendant to remove it." He then said, in conclusion: "Being of the opinion that the principle is not established by any authority binding on us, and seeing nothing in the nature of the case which requires a notice to be given to the upholder of a nuisance, as a condition to his being made responsible for its consequences, I think such notice is not required to be given. Every one is bound so to use his own property that it shall not be the means of injury to his neighbors; and I think the proprietor should himself look to it, and that he can not safely wait to be admonished before reforming what may be dangerous to others." This reason is unsatisfactory. A party, having no knowledge or notice of the existence of an evil, can not reform it; and he, consequently, can not be chargeable with a fault or a wrong for not doing it; nor can he, under such circumstances, be said to uphold a nuisance, or be waiting to be admonished to reform it. Such conduct implies a willing, and not merely an involuntary, acquiescence in the continuance of the wrongful act. I am, therefore, constrained

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to hold that the rule requiring notice is proper and should be adopted.

It is proper, before dismissing the question, to notice that the opinion of the general term assumes that, in such case, all damages resulting between the conveyance by the wrong doer and a demand of the alienee to abate the nuisance will be lost; and it is argued that a party can not be deprived of his right of action therefor, by the act of the person doing the wrong in alienating the premises to a party of his own selection. This is answered by the decision in *Waggoner v. Jermain*, 3 *Denio* (N. Y.) 306, which had previously been cited, and decides expressly that such original wrongdoer, notwithstanding such alienation, remains liable for the damages occasioned by the continuance of the nuisance subsequent to the conveyance; and such is a part of the rule in *Penruddock's Case*.

It is also stated in that opinion that the evidence in the case showed that the superintendent of the defendant's road had notice, prior to the years 1864 and 1865 (when the damages in question were sustained), from Charles Cooper, an owner of property adjacent to the plaintiff's, and exposed to like damages in case of floods, but who was not an agent of the plaintiff nor interested in the company, of the nature of the nuisance and its effect, and was asked to open the channel, and that he replied that he would not do it; and the judge giving the opinion closes it by saying that he was inclined to think that sufficient notice, if any was required. This is clearly untenable. A notice affecting the land of one party can not be extended to a different piece of ground owned by another.

It follows from what has been said, without the expression of an opinion as to the third ground of the motion for a nonsuit, that proof of the mere continuance of the nuisance on the land of the defendant,

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without such knowledge or notice of its existence as to charge it with fault for such continuance, was not sufficient to maintain the action.

The judgment must, therefore, be reversed and a new trial granted, costs to abide the event.

All concur, on ground that proof must show notice or knowledge on the part of defendant of the existence of the nuisance, but that no request to abate it was necessary.

Judgment reversed.

THE NEW ORLEANS, MOBILE, & CHATTA-
NOOGA RAILROAD COMPANY v. HAN-
NING.

15 Wallace, 649.

*Supreme Court of the United States ; December Term,
1872.*

Contracts. Negligence. A contractor with a railroad corporation who agrees to build a wharf, and to carry on the work under the direction of the company's engineer, and to his satisfaction, acts as the company's agent, and it is liable for any injury resulting from the negligent manner in which the wharf is constructed or protected.

A statute providing that a certain railroad corporation shall not be liable for debt incurred by those who contract with it for building its road, &c., nor for any injury to person or property caused by the act or omission of the persons so contracting with it, is merely declaratory of the common law, and confers no exemption on the company.

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Error from the supreme court of the United States to the circuit court for the district of Louisiana.

This was an action by Hanning against the New Orleans, Mobile, & Chattanooga Railroad Company, to recover damages for injuries to his person, received while crossing a wharf in process of construction on the defendant's land. The facts, as shown by the record, are stated in the opinion. Upon trial in the court below, the jury rendered a verdict for the plaintiff, and judgment was entered thereupon for the plaintiff accordingly. To review this judgment the defendant brought this writ of error.

J. A. & D. G. Campbell, for the plaintiff in error.

T. J. Durant, for the defendant in error.

HUNT, J.—The first objection presented by the defendant below is, that the wharf in question was not a public wharf; that the plaintiff came upon the same without business, invitation, or inducement; that he was a trespasser, and if he suffered injury it was in consequence of his own wrong.

We are not furnished with the evidence necessary for the decision of this question. The record does not state whether this was the wharf of an active steamboat company, where all travelers were permitted and substantially invited to come and go; whether the plaintiff was there upon the special invitation of some one connected with the wharf; whether by public use and general permission he might deem himself invited to be there; or whether he was an idler without pretense of right or business. The judge submitted the question to the jury, whether the wharf, at the time of the accident, was, and for many years had been, a public place, upon which all people were per-

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mitted by law to come and go, and did come and go at pleasure. The jury found the affirmative of this proposition. The only evidence set forth on this point contained in the record, is the legislative resolution of March 6, 1869, certain conveyances of property adjoining the wharf, as described in maps annexed, and the contract of the company with Carvin. The resolution authorizes the defendants to inclose and occupy for its use, certain portions of the levee, batture, and wharf, in the city of New Orleans, and provides that no vessel shall occupy said wharf except by the permission of the company. The contract with Carvin is important upon another branch of the case, but has no significance upon the question of the manner of occupying the wharf, or to show how or why the plaintiff was on the wharf, at the time he received the injury. So far as it states general rules and propositions, the charge of the judge seems to be correct. Whether it was sound, as applied to the case presented by the evidence, we have not the means of ascertaining. No error appears, and we can not assume that it is erroneous.

The second objection urged by the defendant below, arises upon the contract with Carvin, already mentioned. It is insisted that the wharf at the time of the accident was in the possession of Carvin; that the negligence, if any, was his, not that of the company; and that the company is not responsible for any negligence by him or those employed by him.

By this contract Carvin agrees: 1. To furnish the materials and the labor necessary for the rebuilding of the wharf in question. 2. To build it with such mooring-posts, cluster-piles for fenders every twenty feet, rows of piles on boundary lines above and below, slips or inclines, as the company, through their engineer, may require, making the old wharf as good as new, and the new in the most workmanlike manner. 3.

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To complete the whole within a month. 4. To submit to the supervision and direction of the engineer of the company. 5. To do the work to his satisfaction. The company do not yield to Carvin the possession or control of the wharf. They may direct the number of mooring-posts, cluster-piles for fenders, rows of piles, slips, and inclines, paying according to the number of square feet covered. They are at liberty to direct how much material shall be used, and how it shall be laid to make the old wharf as good as new, and to make the new of the best workmanship. They are to supervise the work to be done. They are to direct how it shall be done. This includes the power of controlling and managing the entire performance of the work, within the general limits mentioned. It includes the possession of the wharf, the direction, management, and control of all the details of the work. It makes Carvin their agent and servant, receiving a larger or smaller compensation, as they may expand or contract his work.

The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. *Story on Agency*, § 452; 2 *Addison on Torts*, 2d ed. 343. So long as he stands in the relation of principal or master to the wrong-doer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Difficult questions arise in the application of this rule. Nice shades of distinction exist, and many of the cases are hard to be reconciled. Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt, was to be as good as new. The

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new was to be of the best workmanship. This is quite indefinite, and authorizes not only, but requires a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done, but how it shall be done. This is an important test of liability. *Kelly v. Mayor*, 11 *N. Y.* 432.

Camp v. The Wardens, 7 *La. Ann.* 322, was a case arising in Louisiana, and very much like the present in its facts. The owners were there held liable. All the authorities are cited and commented upon by the court, both of the common and the civil law. The civil law, it was said, held the same rules on this subject as the common law. *Pothier on Obligations*, §§ 121, 453; *Droit Civil, de Touillier*, Book 2, tit. 8, § 284, vol. 2.

In *Painter v. Mayor*, 46 *Pa. St.* 213, STRONG, J., holds the defendant not to be liable, and says, "The defendants have no control over the men employed by the contractors or over the contractors themselves. They could not dismiss them or direct the work." The cases are reviewed and the rule laid down as is herein above stated.

Knight v. Fox, 1 *Eng. Law & Eq.* 477, and *Steel v. Southeastern R. R. Co.*, 32 *Id.* 366, are cited by the defendant. The first contains nothing in hostility

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to the suggestion made. In *Steel v. Southeastern Railroad Company* it was held that the company was not liable for any injury done by the contractor, and the contract contained an authority to the company to superintend and direct the work. The case shows that the act which caused the injury was committed in violation of their orders. They expressly forbade the digging of a certain channel. It was dug in violation of this direction, and for the damage resulting therefrom, the court held them not to be liable. This order to the contrary does not necessarily exempt the principal, but it is a circumstance of weight. *Pack v. Mayor*, 8 *N. Y.* 222; see, also, *Storrs v. Utica*, 17 *Id.* 104; *Higgins v. Watervliet Turnpike Co.*, 64 *Id.* 23; *Robbins v. Chicago*, 4 *Wall.* 679.

It is said that by the act of the general assembly, passed January 21, 1870, the liability of this corporation is defined in a number of cases. Section 2 of the act declares "that the said corporation, its officers, or employes, shall not, in any case, be liable for any debts contracted or liabilities incurred by any person or persons who shall have contracted, or who shall contract with it, to construct any portion of its road, buildings, or appurtenances, or its rolling stock, or to furnish any materials or labor to be used for such construction, or for its maintenance or operation. Nor shall said company, its officers, or employes, be liable for any injury to person or property, or loss of life, which shall be caused by any act or omission of any person or persons so contracting with it, or any of his or their employes or agents."

This was doubtless intended as a declaration of the rights of the company convenient to be embodied in its charter, and is in affirmance of the existing law. It contains two general principles: 1. That the corporation shall not be liable for the debts to third parties of those contracting to construct its road or to

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furnish materials therefor. It would not be upon general principles of law. The statement, in fact, confers no exemption. 2. That it shall not be liable for injury to person or property caused by the acts of such contractors or their servants. In each of these instances, the exemption is in the case of contractors, who are themselves the principals, not when they are the agents or servants of the company. In each case there could be no liability at common law had the statute not been passed. We think that, upon general principles of law, the company in this case are responsible for the negligence of Carvin, and that this statute does not alter its position.

It would seem that, prior to the passage of the act authorizing the defendants to occupy and possess the wharf, it had been open to the public, free to the passage of all, at their pleasure to come and go. The judge charged, in substance, that this right of passage to the public continued until some notice should be given to those accustomed to use it that their rights had ended. This principle is one of quite general application. A railroad or steamboat company, by the departure and arrival of their conveyances, give an invitation to all who desire to approach their boats or cars to pass over their wharf or platform. One accustomed so to pass can not be deemed a trespasser in repeating his act after a new station or landing has been adopted and the cars or boats have ceased to use the old one. To exclude the passer's right so as to make him in fault, and to prevent his recovery for an injury sustained by leaving the place in a bad condition, notice must have been given of its changed character, and that the rights of passers are terminated. This principle is so familiar, and exists in so many forms, that it is unnecessary to elaborate it. 2 *Addison on Torts*, 141 ; *Corby v. Hill*, 4 *Com. B. N. S.* 556.

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Upon the whole record we are all of the opinion that the judgment should be affirmed.

Judgment affirmed.

KENNEDY v. THE DUBUQUE, C. & M. RAIL-
ROAD COMPANY.

84 Iowa, 421.

Supreme Court of Iowa; June Term, 1872.

Construction of railroad. Alteration of highway. Under the statutes of Iowa defining the jurisdiction of the circuit courts (*Iowa Laws of 1868*, ch. 86, p. 113), those courts have no jurisdiction of proceedings by trustees of a town to compel a railway company to make further alterations or amendments in a highway, over or under which the railway company has constructed its road, under *Iowa Rev. § 1821, 1822.*

Appeal to the supreme court of Iowa from the circuit court for Clayton county.

This was an action by Kennedy and others, as trustees of Mendon township, to require the defendant to make certain alterations in its railroad along and across the highway between the city of McGregor and the village of North McGregor, and situate in said Mendon township.

The petition averred that the plaintiffs were the trustees of Mendon township, in Clayton county; that the defendant had constructed its railroad along and four times across the highway in said township,

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between the city of McGregor and the village of North McGregor, a distance of less than one mile ; that said highway there runs between a rocky bluff on the west and the Mississippi river on the east ; that the space between them, and occupied by both the high way and railroad, is only about forty feet, and that the four crossings made by the latter are either above or below the surface of the highway ; that the plaintiffs have duly notified, in writing, the defendant, of the alterations and amendments they required, a copy of which is annexed to the petition ; that defendant refused to assent thereto, or make any agreement whatever, and they can not agree respecting the same.

To this petition the defendant demurred, on the following grounds: *First*. The court has no jurisdiction of the subject of the action. *Second*. The plaintiffs have no legal capacity to bring this suit.

The court overruled the demurrer on both grounds. The defendant appealed.

COLE, J.—The first question presented by the demurrer is, as to the jurisdiction of the circuit court over the action. This involves the construction of several statutes. By a statute which took effect February 9, 1853, it was enacted (*Iowa Rev.* § 1321, 8): "Any railroad corporation may raise or lower any turnpike, plank-road, or other way, for the purpose of having their railroad pass over or under the same ; and in such cases, said corporation shall put such turnpike, plank-road, or other way, as soon as may be, in as good repair and condition as before such alteration. § 1322, 9. If the proprietors of such plank-road or turnpike, or the trustees or city council having jurisdiction of such ways respectively, require further alterations or amendments of such turnpike, road, or way, and give notice thereof, in writing, to the agent

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or secretary of such railroad corporation, and if the parties can not agree respecting the same, either of the parties may apply to the county judge, who, after reasonable notice to the adverse party, shall make determination respecting such proposed alterations or amendments, and shall award costs in favor of the prevailing party."

By an act approved March 22, 1860, and which took effect July 4, 1860, creating a board of supervisors, defining their duties, &c. (*Rev. art. XI. ch. 22*), said board was given jurisdiction (*Rev. § 312, subd. 13*) "to appoint commissioners to act with similar commissioners" from other counties, to lay out roads, &c., extending into both. Subd. 16. "To alter, vacate, or discontinue any state or territorial road within their respective counties." Subd. 17. "To lay out, establish, alter, or discontinue any county road heretofore or now laid out, or hereafter to be laid through or within their respective counties." § 318, subd. 2. Said board is required to keep "a book to be known as the 'road record,' in which shall be recorded all proceedings and adjudications relating to the establishment, change, or discontinuance of roads." § 324. "After the taking effect of this act, neither the county judge nor county court shall have or exercise any of the powers hereby conferred upon the board of supervisors. . . . § 325. In all cases where the powers hereby conferred upon said board have heretofore been by law exercised by the county judge, county court, or other county officers, the said supervisors shall conduct their proceedings under said powers, in the same way and manner, as nearly as may be, as is now provided by law in such cases for the proceedings of such county judge, county court, and county officers, provided they are not inconsistent with the provisions of this act."

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By an act passed by the same legislature, in relation to roads and highways, approved April 2, 1860, and which took effect on January 1, 1861, it was enacted (*Rev. § 327*): "That the board of supervisors shall have the same power, and perform the same duties, in relation to roads and highways in their respective counties, as have been exercised under previous laws by county judges and county courts, subject to such modifications as shall be or have been made at the present session of the legislature."

By an act establishing circuit courts, &c., approved April 3, 1868, and which took effect, as to said courts, on January 1, 1869, said circuit courts were given jurisdiction in certain matters therein enumerated, "and of all other actions and proceedings of which the county judge now has jurisdiction." See *Iowa Laws of 1868*, ch. 86, p. 113.

These are all the statutes bearing upon the subject, and, from a careful reading of them, it is too manifest to require argument to demonstrate it, that complete jurisdiction in road matters, except as to *ad quod damnum* proceedings therein, was given to the board of supervisors. By *Rev. § 327, supra*, all the jurisdiction in relation to roads and highways theretofore exercised by county judges was conferred upon the board of supervisors. And, by *Rev. § 1322, supra*, jurisdiction over the particular matter here in controversy was given to the county judge. Since, then, the county judge exercised the jurisdiction before section 327 took effect, the board of supervisors would properly exercise it thereafter, and now.

But, it is argued by appellee's counsel, that since, by the act of 1868, the jurisdiction of the county judge was conferred upon the county court, that court has, at least, concurrent jurisdiction, under the rule that if a prior and later act can be reconciled, both shall stand. The difficulty, however, is, that by sec-

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tion 327 all the jurisdiction of the county judge in relation to roads was transferred to the board of supervisors. So that the act of 1868, which gave to the circuit court jurisdiction of "all proceedings of which the county judge *now* has jurisdiction," did not confer any authority upon the circuit court respecting this matter; for that, the county judge did not then (*now*, in 1868) have any jurisdiction to be transferred to the circuit court.

It follows that the circuit court did not have any jurisdiction, and that it erred in not sustaining the defendant's demurrer. It, therefore, becomes unnecessary to notice the other point.

Judgment reversed.

THE CITY OF NEW HAVEN v. THE NEW YORK
& NEW HAVEN RAILROAD COMPANY.

89 *Connecticut*, 128.

*Supreme Court of Errors of Connecticut; February
Term, 1872.*

Bridges. The charter of a city provided that the common council might, from time to time, order the building, widening, or repairing of all bridges crossing railroads in the city, in such manner as in their judgment public convenience might require; and that, in case any railroad company whose road such bridge crossed should neglect to obey such order, the common council might cause the required work to be done at the expense of the city, and that the treasurer of the city might collect the amount of such expense in an action of trespass on the case in his own name. *Held*, that the

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word "bridge," as used in the charter, was restricted to the bridge proper, to the exclusion of embankments, filling, and approaches, unless the immediate approach might be included as part of the bridge proper itself; and that, if such approaches were included, the expense of their repair could not be recovered in an action of assumpsit in the name of the city.

Case reserved for the advice of the supreme court of errors of Connecticut by the court of common pleas of New Haven county.

This was an action of assumpsit by the city of New Haven to recover from the New York & New Haven Railroad Company the expenses of repairing the pavement of the approaches to a bridge crossing the track of the defendant. The facts of the case are stated in the opinion. The action was brought before a justice of the peace, from whose judgment an appeal was taken to the court of common pleas. The common pleas reserved the case for the advice of the supreme court of errors.

Doolittle, and *Bennett*, for the plaintiff.

Watrous, for the defendant.

SEYMOUR, J.—The defendant corporation in 1848 constructed its railroad, laying its track in the bed of the old canal. The road crosses Fair-street, in New Haven, below the level of the street, at right angles. The bridge across the excavation was built some six feet higher than the old bridge across the canal. The approach to the bridge was graded up, and the sidewalks of Fair-street were reconstructed from the bridge to Union-street, a distance of one hundred and eleven feet. All which was done by the defendant in pursuance of its charter. In 1849 the act was passed which appears as section 481 of the act concerning

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communities and corporations. In 1857 the act was passed which now appears as section 33 of the charter of the city. The plaintiff claims that, under the act of 1849, it is the duty of the defendant to keep in repair the highway in Fair-street from Union-street to the bridge, and that this duty includes the reconstruction and repair of the pavements of the sidewalks of Fair-street. The defendant corporation was duly notified of the necessity of reconstructing the pavement, and required to do it, but wholly neglected the requisition. The city thereupon made the needed repairs, and now seeks to recover the expense in an action of assumpsit on the common counts.

Whatever the law may be in respect to the other claims of the plaintiff, we think it clear that this action can not be sustained. Until 1857 no mode had been provided by statute for enforcing the duty of railroad companies in regard to such bridges as pertained to them to make and maintain. The general assembly in that year passed two statutes on that subject; one being the act which is now section 33 of the charter of the city of New Haven; the other being what now appears as section 487 of the act concerning communities and corporations. This last mentioned act provides in substance, that when any railroad company shall neglect to construct any highway or bridge which it is their duty to construct, &c., or shall neglect to keep in good and sufficient repair any bridge, or any embankment, filling, or abutment, which it is their duty to maintain, &c., &c., it shall be the duty of the state attorney of any county wherein such neglect exists to make complaint thereof to the superior court of the county, &c.

Section 33 of the city charter is as follows:

“Said court of common council shall have supervision over all bridges crossing railroads in said city, and may, from time to time, order the building, widen-

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ing, or repairing of such bridges, in such manner and within such times as in their judgment public convenience may require; and in case any railroad company whose road such bridge crosses shall neglect to obey such order, said common council may cause the required building, widening, and repairing to be executed at the expense of said city, and the treasurer of said city may then collect the amount of such expense in an action of trespass on the case, in his own name, against such delinquent company."

Now the word "bridge," may, in certain connections, be so used as to include the embankments and approaches, but in section 33 of the city charter we think the word is restricted to the bridge proper, to the exclusion of embankments, fillings, and approaches, unless indeed perhaps the immediate approach may be included as part of the bridge proper itself.

We thus think because, first, the legislature, in the general act passed in 1857, gives a full and appropriate remedy, by an appeal to the courts, for all neglect of duty by railroad companies in the premises. Embankments and fillings and abutments, as well as bridges themselves, are in direct terms included within the provisions of that act, whereas in the city charter the special duty of the city council is limited to building, widening, and repairing bridges, omitting all mention of other structures or appendages. Secondly, the authority of the city council conferred by section 33 is in its nature special and exceptional, and therefore to be somewhat strictly construed. Third, if the word "bridge" in the city charter were held to include the approaches, still the charter merely authorizes the treasurer of the city to collect the expense of repairs in an action of trespass on the case in his own name. Neither the charter, nor any other statute, warrants a recovery in a common-law action of assumpsit in the name of the city; and without the aid of some statute

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provision it is clear that the present action can not be maintained.

It will be seen that we thus decide this case against the city, without deciding some important questions which were discussed at the bar regarding the duty of railroad companies under section 481 of the act concerning communities and corporations. We have felt embarrassed by the difficulties involved in these questions, and one reason why we do not now decide them is, that some further legislation seems to us to be necessary and proper, to make more definite the precise duty intended to be cast upon railroad companies.

And first, it seems important that some provision should be made for determining what shall be deemed approaches to a bridge, in order that the dividing line between the duties of the city or town on the one hand, and of railroad companies on the other, may be distinctly marked. This might be done by direct legislation, or by reference of the question to railroad or to county commissioners, or some other proper tribunal.

And secondly, if, as the plaintiff claims, it is the intention of the legislature to cast upon railroad companies the burden of ordinary highway repairs upon and over railroad bridges and their approaches, to the entire relief of towns and cities from that burden, it seems desirable that the precise duty should be distinctly declared. The true reason for requiring railroad companies to build and maintain bridges and their approaches is, that the construction and operation of their railroads make such structures necessary, where otherwise they would not be needed. They should, therefore, on principles of natural justice, be built and maintained by the railroad companies. All such repairs as from time to time become necessary to the structures, as such, should be at the expense of the

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railroad companies. But the repair of highways upon and over the approaches to a bridge, if the necessity of such repairs in no way arises from the existence or operation of the road, and if they are such as would be needed independently of the existence of the road, justly remain a charge upon the town or city. It must be conceded that however true this may be in theory, there is in practice a serious difficulty and some inconvenience in making a separation and division of duties between railroad companies and towns. And yet some division seems inevitable, in regard, for instance, to casual obstructions of the highway by nuisances, by snow, or by ice, and in regard to other hindrances to public travel of the like nature. The care of such matters naturally devolves upon the local authorities, rather than upon railroad companies, as being within the ordinary line of the duties of the one, and foreign to the ordinary duties of the other. We intimate no opinion upon the question, whether under the existing statute the maintenance and repair of sidewalks and pavements upon the approaches to a railroad bridge pertain to the railroad company or to the local authorities. We hope that, before a case shall arise requiring a decision of that question by the court, the legislature will provide a clear rule on the subject. Under a statute similar to ours, the English courts seem to hold that the entire duty of maintaining the highway, and keeping it in repair, is with the railroad company, on the bridge and upon the approaches, as far as the grade of the highway is changed. 8 *El. & B.* 836.

Others concurred.

Judgment advised for defendant.

WADEMAN v. THE ALBANY & SUSQUEHANNA
RAILROAD COMPANY.

51 New York, 568.

*Commission of Appeals of New York; March Term,
1873.*

Farm crossings. Construction. Under a provision in a general railroad law requiring every corporation organized under it to erect and maintain farm crossings, &c., for the use of the proprietors of lands adjoining its railroad (*N. Y. Laws of 1850, ch. 141, § 44*), if no election is given in terms to the land owner for whose use the crossing is to be made, it is the right of the corporation to determine where the crossing shall be located. In the exercise of this right, however, the interest of the corporation is not alone to be considered, but regard must be had to the convenience of both parties, and such a location must be made as will not subject the proprietor to needless and unreasonable injury.

Where one owning land upon both sides of a railroad brought an action under such a statute to compel the railroad company to construct a suitable farm crossing, also claiming damages, and the court found that the crossing actually built by defendant was inconvenient for plaintiff, and not of easy access, and that the proper place for a crossing was where plaintiff desired, but that the expense of building a new crossing at that point would exceed the amount of the damage to the plaintiff from being confined to the crossing already erected,—*Held*, that a judgment which, instead of directing a specific performance by defendant of its obligation, gave plaintiff a pecuniary compensation, to an amount less than the cost of erecting a new crossing in the proper place, was not erroneous; where the statute did not forbid the giving of damages for the breach of duty on the part of defendant.

Appeal to the commission of appeals of New York from the general term of the supreme court of the third judicial district.

Wademan v. Albany, &c. R. R. Co.

This was an action by John J. Wademan to compel the Albany & Susquehanna Railroad Company to construct a farm crossing over the defendant's road for the use of the plaintiff, as proprietor of a farm through which the defendant's road passed. The plaintiff had previously requested defendant to build a crossing, at a point where he had been accustomed to travel to and fro, for farm purposes. Defendant refused to build at the designated place, but built a crossing at the extreme north part of plaintiff's farm.

The court found that the place designated by plaintiff was the proper place for a crossing; that the crossing as built was inconvenient and not easy of access for the plaintiff, but held that the expense of building a new crossing at the proper place would exceed the damages sustained by plaintiff, and that equity would be better administered by requiring defendant to pay such damages. Judgment was therefore directed for the plaintiff, for damages and costs, and was entered accordingly. From this judgment the defendant appealed to the general term, which affirmed the judgment. From the judgment of the general term, the defendant appealed to the commission of appeals.

Samuel Hand, for the appellant.

O. M. Hungerford, for the respondent.

JOHNSON, Com.—The question in this case arises upon section 44 of the general railroad act of 1850. *N. Y. Laws of 1850*, p. 233. That section requires that every corporation formed under the act "shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm crossings of the road, for the use of the proprietors of lands adjoining such railroad." It is contended that

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under this statute the right to designate where the crossing should be made is in the land owner, and the case of *Wheeler v. Rochester, &c. R. R.*, 12 *Barb. (N. Y.)* 227, to that effect is cited in support of the position, and certainly inclines to that view. But it does not seem to me that sufficient attention was paid to the language of the statute and all the circumstances in which it was intended to apply. It is not limited to cases where the corporation acquires the land by the exercise of the power of eminent domain, but applies with equal force where the lands are purchased at a voluntary sale. In each case the duty to make farm crossings is imposed on the corporation; and the extent of the duty is the same in each. From the words, "for the use of the proprietors of lands adjoining," is to be implied an exclusion of any right in others than the proprietors to use the farm crossings, and the openings, gates, or bars through the railroad fence. No election is given in terms to the land owner for whose use the crossing is to be made. In general, the party who is to act has the election in case one is to be made. *Co. Litt.* 147, *a*. And where the act to be done is single, the party bound to act is to do it at his own risk of its being in accordance with his obligation. Thus in *Holmes v. Seely*, 19 *Wend. (N. Y.)* 510, in regard to a way of necessity, which rests on the notion of an implied grant, it was held that the way should be a convenient one over the adjoining close of the grantor, regard being had to the interests of both parties, and that subject to this qualification the grantor of the land should assign the way. That is, the owner of the servient tenement is in the first instance to locate the way. To the same effect is *Russell v. Jackson*, 2 *Pick. (Mass.)* 574. That the interest of neither party is alone to be regarded in the location of the crossing, but that it is, looking to all the circumstances, to be suitable and convenient, is certainly

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just in itself, and is fairly to be inferred, as well from the terms of the statute as from the language of the cases cited. In the analogous case of one having a right to make a way over another's land, it has been held that the power must be exercised in a reasonable manner, having regard to the convenience of the owner of the servient land, and subjecting him to no needless and unreasonable injury. Thus in *Abson v. Fenton*, 1 *Barn. & C.* 195, where, under an act of parliament, convenient and necessary ways were granted, it was held that the true question was whether the mode adopted was such as a prudent and rational person would have adopted if he had been making the road over his own land, and not over the land of another man. This view, the court added, would, on the one hand, exclude all wanton, capricious, and causeless injury to the owners of the servient lands, and, on the other, allow a beneficial exercise of the power conferred by the act of parliament.

In the case before us, the judge who tried the cause has found that the crossing actually built by the defendant was inconvenient for the plaintiff and not of easy access, and that the proper place for a farm crossing for the plaintiff was at the point where the plaintiff desired it to be made. That finding makes out a cause of action against the defendant within the principles before stated. The court, however, instead of directing a specific performance of the obligation, proceeded to inquire of the damages which the plaintiff had sustained, and gave him a pecuniary compensation. Of this the plaintiff does not complain. There were many cases in which a court of equity, while refusing a specific performance, would give the injured plaintiff compensation in damages. *Story Eq. Jur.* §§ 794-800. And under the code, where issue is joined, such relief may be given as the case calls for, irrespective of the form of the summons, especially as

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damages are claimed in the complaint. Acting on these grounds, and finding that the expense of building a crossing at the point designated by the plaintiff would exceed the plaintiff's damage by being confined to the crossing made by the defendant, the court ascertained the amount of the damage and gave judgment therefor. This course is approved in *Clarke v. Rochester, &c. R. R. Co.*, 18 *Barb. (N. Y.)* 350, and can not be complained of by the defendant, to whom the judgment is more favorable than it was otherwise entitled to. Nothing in the statute prevents damages being given against the defendant for the breach of duty.

Some of the questions objected to bearing upon the extent of the plaintiff's damages are awkward in form, but are yet, it seems to me, fairly competent. The substance of the inquiry was as to the effect of the one or the other crossing on the value of the land separated by the railroad from the rest of this farm. It was not as to the general effect of the railway embankment on the value of the farm or of the separated lands. This would have been improper, as not touching the real issue. The inquiry, as made, was only another method of measuring the relative inconvenience of the crossings, and thus furnishing a criterion of the plaintiff's actual damages.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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WILLIAMS v. THE NEW YORK AND NEW
HAVEN RAILROAD COMPANY.

89 Connecticut, 509.

*Supreme Court of Errors of Connecticut; January
Term, 1873.*

Lands. Dedication. A railroad company purchased a strip of land in front of its passenger station and freight depot, making an open space afterwards connected at each end with a public street of the town. The public used the place constantly and freely, both in going to and from the railroad station and depot, and in passing from one part of the town to another. One who, subsequent to these acts, had purchased land adjoining this space, regarding it as a public way, erected a restaurant and other buildings fronting upon it, and he and the railroad company laid sidewalks, crosswalks, and gutters, and made and allowed the authorities of the town to make other improvements upon the open space referred to. Several years afterwards the railroad company undertook to remove a portion of the sidewalk so laid, for the purpose of making more room for carriages in front of the passenger station. Upon a bill in equity filed by the owner of the adjoining land for an injunction against the removal of the sidewalk,—*Held*, that the circumstances of the case did not show that the railroad company had dedicated the land to public use, nor that the public had accepted it. And the railroad company was not estopped from denying that there was any dedication.

Case reserved for the advice of the supreme court of errors of Connecticut by the superior court of Fairfield county.

This was a bill in equity by Abraham W. Williams against the New York & New Haven Railroad Company, to restrain that company from removing a sidewalk in front of his premises, claimed to be a public way.

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The facts found by the court were as follows :

The respondents are a railroad company, and were organized under their charter, with the usual powers of such a company, in the year 1844. In June, 1847, under the provisions of their charter, they took and appropriated certain lands of one Wells R. Ritch, in the town of Stamford, for a right of way and depot and station grounds, and soon after laid their tracks and built a depot and passenger station thereon, where the railroad tracks and depot and station now are, for which land compensation was duly made. The land so taken and occupied was fifty-four rods in length, and four rods in width. Afterwards, in December, 1847, Ritch sold and conveyed to the railroad company another strip of land adjoining the first mentioned, about ten chains in length, and two rods wide on the west end and three rods on the east end, the strip terminating at the west end at a cross street called Atlantic-street, and constituting a widening of the space in front of the passenger station and freight depot. The railroad company did not lay tracks upon this strip, but graded it and rendered it fit for use, and has kept the space in repair and in order at their expense up to the time when the present suit was brought, and they suffered the same to remain an open space, free of access from Atlantic-street, from the time of its purchase, and the same immediately began to be and since that time has been freely, constantly, and largely used by the public, as a road in passing to and from Atlantic-street and the station and depot, and the premises of the petitioner, as occasion required, with the knowledge of and without objection from the respondents. At the date of the petition twenty-eight passenger trains left the station daily between the hours of six in the morning and nine in the evening, and ten trains of the New Canaan railroad during the same period, a road which had the use

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of the station by contract with the respondents; and in addition to the passenger trains, six freight trains received and delivered freight at the depot in every twenty-four hours. The travel to and from the station over the strip in question was, at the date of the petition, and afterwards at the time of the acts of the respondents complained of, very great, and much in excess of the travel across it to reach other points. The business of the railroad company at the station and depot has increased more than three hundred per cent. since the year 1848, and is still rapidly increasing. Owing to such increase, the space at the time of arrival of certain trains is closely occupied by carriages waiting for passengers, and has been for some time so occupied by carriages in waiting, especially during the summer months, and at such times passage over it from west to east or from east to west is attended with much difficulty.

Afterwards, in the year 1859, the town of Stamford laid out, opened, and worked a highway, east of and connected with the strip in question at its easterly end, where there was a stone wall and a bank of earth about three feet in height at the highest point and extending diagonally across a part of the highway and across the strip.

In connecting this highway at its westerly end with the land of the railroad company, the town removed and used the stone wall and embankment, which wall was the boundary of the company's land, without objection from the company; and also, without objection from the company, graded the highway so as to obtain an easy means of access to and egress from the strip in question. This highway is known as Railroad-avenue.

Afterwards, in the year 1866, another highway called Pacific-street, was laid out, opened, and worked by the town of Stamford, from Main-street in the

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borough to Railroad-avenue, a short distance east of the strip in question. These two streets have ever since been and now are public highways, and have been and now are used as such, and taken together furnish a means of access to and egress from the strip in question, and by crossing the same a means of connection with Atlantic-street and other streets of the borough.

Since the opening of these streets the strip of land has been freely, constantly, and largely used by the public, as a road in going to and from the railroad station and freight depot, and to and from the eastern portion of the town and borough, and the portion thereof south and west of the railroad station, with the knowledge of the company and without objection; and its use for a road has become a matter of common convenience to the public, and a necessary means of convenient communication between the different parts of the town and borough.

The petitioner, on May 10, 1848, with one Rowell, purchased of Ritch, before mentioned, and now owns a piece of land lying north of and adjacent to the piece in question, and extending along its north line and fronting upon it. After the purchase he built upon it a house and outbuildings, used as a restaurant and saloon, in the year 1848, and in the year 1853 a livery stable; in the year 1854 an addition to the restaurant; in the year 1855 a house used as a tenement house; and in the year 1870 a building used as a hotel, containing seventeen lodging apartments. All these buildings, except the stable, were located near to the line of the land of the railroad company, and fronted upon it as upon a public street. The petitioner expended upon these buildings about the sum of eighteen thousand dollars. They are now used, one as a restaurant, two as tenement houses, one as a livery stable, and one as a hotel, and are occupied or

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rented by the petitioner, and are a source of great profit to him. In erecting the buildings, the petitioner, and all others in his employ, used the strip of land in question as a public road, without objection from the railroad company, and the premises of the petitioner are so situated that there is no reasonable mode of access thereto except over the strip in question, and the making of any other way from Atlantic to Pacific-street, would be attended with large expense.

The petitioner offered himself as a witness in his own behalf, to prove that in purchasing his land and erecting the buildings upon it, he fully believed the tract had been by the company opened and dedicated as a public highway, and that it was a highway in fact, and that he acted in such belief, and would not otherwise have so acted. The respondents objected to this evidence, but the court received it and finds the fact to be in accordance with this testimony.

The petitioner also testified that, after he had formed an intention to purchase a lot near the station then to be built, and in view thereof and just prior thereto, he informed the then chief engineer of the company of his intention and consulted with him about the same, and was by him in their office shown a map of the company upon which were marked the strip in question and other tracts of land purchased by the company, with the tracks of the road and the proposed location of the station, and was then informed by the engineer, that this strip of land was to be opened by the company as a road, though whether the engineer said "to the station" the petitioner did not recollect; and that thereupon and in consequence of this information he made the purchase. The respondents objected to this evidence, but the court admitted it and finds the fact to be as stated by the petitioner.

In the month of November, 1859, the railroad com-

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pany laid a sidewalk along the northerly side of the strip in question and along the front line of the petitioner's land from Atlantic-street on the west, to and just beyond the restaurant of the petitioner, and constructed a gutter under the same, which gutter was also extended somewhat further eastward, and also constructed two crosswalks from the sidewalk across the open space and in front of the petitioner's premises, to the track of the railroad immediately in front of the passenger station. The petitioner furnished a portion of the stone for the purpose and the respondents a portion, and the respondents agreed with the petitioner to lay, and did lay, the stone so furnished by him in front of his premises, and on parts of the crosswalk. This sidewalk and crosswalk have ever since their construction been freely, constantly, and largely used by the public, either to go to and from the railroad station, or to and from the premises of the petitioner, and also by the petitioner, his tenants, customers, and others, with the knowledge of the company and without objection.

The land in question, the railroad station, and a large amount of the property of the railroad company adjacent thereto, and the premises of the petitioner, are all situated in the borough of Stamford. In the year 1858, the borough, without objection from the railroad company, placed a gas-light upon the land in question close by the sidewalk, and near the crosswalk referred to, and has since maintained the same, at the public expense, which lamp is the only means of lighting the walks, except as light is furnished by lamps at the railroad station.

The warden and burgesses of the borough, on July 2, 1872, ordered the repair of the sidewalk, but no notice was ever served on the respondents, and the petitioner was at the time a member of the board of burgesses and one of the committee on sidewalks.

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The sidewalk is of great benefit to the petitioner's premises, and to the business there transacted, aside from the benefit which the petitioner receives from it as one of the public.

The respondents proved that in May, 1872, they constructed plank sidewalks from their passenger station, on both sides thereof, with intersecting plank walks between, up to Atlantic-street, thereby affording an easy and convenient approach to the station, and a connection between Atlantic-street and the station; that a crosswalk has for a long time been laid across the westerly end of the strip of land in question; and that by means of the crosswalk and the plank-walks, foot passengers can go to and from the station with as much facility as they could by using the stone-walk on the north side and the crosswalk in front of the restaurant.

On or about August 14, 1872, the railroad company took up and removed the stone sidewalk from Atlantic-street to a point near the petitioner's restaurant, leaving a part thereof immediately in front of the restaurant, and threw into the open space the ground previously occupied by the sidewalk. By the taking up of the sidewalk additional space is furnished and considerable standing-room for carriages awaiting trains. In order comfortably to reach the premises of the petitioner foot passengers were obliged, after the sidewalk was removed, to cross the strip of land in question at Atlantic-street, and follow the plank sidewalk, and the crosswalk in front of the petitioner's restaurant, and were practically debarred from reaching the same by going along the north side of the space.

The removal of the sidewalk does not in any way affect public travel over and upon the land in question, except so far as foot passage across the north end thereof is concerned.

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The value of the premises belonging to the petitioner is about thirty-five thousand dollars.

Previously to August 14, 1872, the petitioner was informed by the railroad company that they intended to remove the sidewalk, and at the time the petitioner objected to such removal.

Upon these facts the superior court reserved the case for the advice of the supreme court of errors, with all questions as to the admissibility of evidence admitted, and as to the decree to be passed.

Treat, and *Curtis*, for the petitioner.

Child, for the respondents.

CARPENTER, J.—The bill alleges the existence of a highway over the land in question, and that the respondents are about to remove a sidewalk thereon, and that the petitioner will be thereby specially damaged. To entitle the petitioner to a decree all these allegations must be proved; and it must further appear that he has no adequate remedy at law.

It is very doubtful whether the remedy at law is not entirely adequate. If a public prosecution would compel a restoration of the highway to its former condition, and an action at law would afford a remedy for the special damage sustained, there would seem to be little need of a resort to a court of equity. But we waive the discussion of this question, as we are satisfied that upon the facts stated the petitioner is not entitled to relief.

Waiving also a discussion of the question whether the petitioner has such a special interest in the subject matter as will enable him to maintain an action in his own name, and conceding for the purposes of the case that he has such an interest, we will proceed to consider whether the *locus in quo* is a public way.

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To maintain this suit the petitioner must show, either that it is a public way in fact, or that the respondents have so treated it as to be estopped from denying, as against the petitioner, that it is a public way.

It is not pretended that it was ever laid out as a highway in any mode pointed out by statute ; but the claim is that it is a highway by dedication.

Dedication implies two things ; an intention on the part of the owner of the land to devote it to public use, and an acceptance of it for such use by the public.

It is now the settled law of this state that a railroad company may dedicate land which it owns in fee, or, in conjunction with the owner of the fee, land in which it has an easement, to the public as a highway. *Green v. Canaan*, 29 *Conn.* 157. But an intention to do so ought to be manifest. It will not be presumed ; on the contrary, in the absence of fraud, or conduct which misleads others, courts will require that it be clearly and satisfactorily proved. It is not found expressly in this case, and will not be presumed as matter of law from the facts which are found.

It is manifest from the location of the land, and from the manner in which it has been treated by the respondents, that their intention in respect to it was simply to afford ample space to accommodate the public in coming to, remaining at, and departing from, their station.

They devoted it to public use in the same sense and to the same extent that they did the station building ; and the use by the public of the land and of the station is for the same general purpose—their convenience in going to and from the railroad trains. As it is the duty of the respondents to furnish suitable shelter for passengers while waiting for, and after leaving, their trains, so it is equally their duty to

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furnish room for carriages, aside from ordinary highways. Indeed they have no right to take a highway for that purpose, and can not do so without subjecting the public to inconvenience. When, therefore, the respondents have set apart a piece of land for this specific purpose, every presumption is against the idea that they intended to dedicate it to the public for an ordinary highway.

The fact that the respondents graded and always kept in repair the space in question is very strong evidence that they did not intend to dedicate it to the public. Perhaps it is not a conclusive circumstance, as it may be rebutted or explained by other facts; but we see nothing in the present case to prevent it having its full weight. All the circumstances of the case, when rightly considered, are quite as consistent with the supposition that the land was intended for the accommodation of the patrons of the railroad, as with the supposition that they intended it for an ordinary highway. That being so, there is certainly no presumption of law in favor of the latter.

We are also satisfied that the case does not find, either expressly or by implication, that the public accepted this piece of land as a public way. It is certainly not found in express terms, and the facts stated will not justify us in inferring it as matter of law. Its use consists mostly in going to and from the station. For that purpose it is necessary and convenient. The public use it precisely as they would a mill-yard, or a drive-way to a gentleman's private residence. The only difference is in the extent of the use. The right to use, by all who have occasion, is derived from the same source, the consent of the owner. It is true the public use it to some extent in going to and from the premises of the petitioner, and in crossing it for other purposes; but that furnishes slight evidence of an acceptance by the public at large as a public way.

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On the other hand there are times, and those times would seem to be frequent, especially in the summer season, when the whole lot is used for standing room for carriages, and so closely occupied that passage over it is attended with much difficulty. This is a strong circumstance tending to show that the use by the public corresponds with the presumed intention of the respondents, that this land should be a private way to accommodate the patrons of the railroad. It is consistent with that, and is, to a considerable extent, inconsistent with the idea of a public way.

We have thus adverted to some of the more important circumstances which satisfy us that we ought not to hold that the *locus in quo* is a highway by dedication.

The next inquiry is, whether the respondents are estopped from denying the existence of the alleged highway.

There is no evidence that the respondents have intentionally induced the petitioner, or others, to believe that this was a public way. It is said that they permitted the town to lay out highways and to connect them by proper grading with the alleged road; that they permitted the borough to light a portion of it at the public expense; and permitted the petitioner to lay a portion of the sidewalk in front of his own premises. We see nothing in all this that is calculated to mislead any one. None of these acts necessarily pre-suppose or require that the way in question should be a public way; nor do we see anything to indicate that the respondents knew, or had reason to believe, that the petitioner, or others, did not well understand the precise character of the way in question.

It is further said that the respondent's engineer told the petitioner that this was to be a public way. But it does not appear that he was authorized to speak for them, or that in assuming to do so he was

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in fact their agent for that purpose. If the petitioner relied and acted upon any such information it was his own folly and in no sense the fault of the respondents.

It is also claimed that the respondents permitted the petitioner to erect his buildings, and to use the way for all purposes connected with the buildings, as a highway. But it does not appear that such use in any way interfered with the objects and purposes for which they designed the land; nor does it appear that they had any reason to suppose that the petitioner was acting upon an erroneous impression as to the nature of the way; nor, indeed, that he would not have done precisely as he did had he known their real intentions. If he chose to erect his buildings upon a road or way, without ascertaining whether it was a public or private way, he is not in a condition to complain if it turns out to be a private way, when he supposed it to be otherwise, unless the other party has used some artifice to deceive, or has in some way intentionally misled him.

We are satisfied, therefore, that the doctrine of estoppel does not aid the petitioner in this case.

The petitioner's counsel further contend that he has acquired a right of way over the premises, in the use of which he can not be disturbed. If he has acquired any such right, and it has been violated, an action at law, in which all the disputed facts can be heard and determined by a jury, is the appropriate remedy. We may remark, however, that the petitioner's case, as stated in the petition, does not rest upon any such ground; and it is quite probable that all the facts bearing upon that question do not appear, and were not fully investigated in the court below. It will be observed, also, that the acts of the respondents which are complained of do not prevent the petitioner from using the way substantially as before.

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It is not a question whether they have a right to close the way and exclude the petitioner and the public therefrom. They claim no such right. They admit fully their obligation to afford reasonable facilities to the public in going to and from their station. For that purpose they claim that all the *locus in quo* is at times necessary. To make it available they propose to use their platform for a walk, which, so far as appears, accommodates the public equally as well, and to remove the sidewalk in dispute, so as to give more standing room for carriages. This interferes somewhat with the petitioner's business, but we think that is one of the risks which he assumed in building as he did. At least we are not satisfied from anything appearing in the case that the respondents have lost their right to use and control the way in question in such reasonable manner as may seem to them best.

There are some questions of evidence reserved in the case, but we deem it unnecessary to consider them in detail.

We advise the superior court to dismiss the bill.

Others concurred.

Dismissal of bill advised.

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THE MILWAUKEE & MINNESOTA RAILROAD
COMPANY v. SOUTTER.

18 Wallace, 517.

*Supreme Court of the United States ; December Term,
1871.*

Mortgages. Upon sale on execution of a railroad, upon which there were two mortgages, it was bought in by the holders of certain bonds secured by the second or junior mortgage. These purchasers organized themselves into a corporation, and managed the road for themselves. Afterwards, proceedings were commenced to foreclose the first or senior mortgage; and to prevent a sale of the road under foreclosure, the new corporation paid off the debt secured by that mortgage. Subsequently to this, the sale upon execution, made to the creditors under the second mortgage, was set aside, as fraudulent and void as against other creditors of the corporation which originally owned the road. *Held*, that a bill in equity by the new corporation against the mortgagees under the first mortgage, to recover back, as paid under a mistake of fact, what had been thus paid to them by the new corporation, or to be subrogated to their decree of foreclosure, could not be sustained.

Appeal to the supreme court of the United States from the circuit court for the district of Wisconsin.

This was a suit in equity by the Milwaukee & Minnesota Railroad Company against Soutter and others, to recover back money paid into court by the complainant, in part liquidation of certain bonds which were issued by the La Crosse & Milwaukee Railroad Company, secured by a mortgage upon a portion of the railroad of that company, and which were at the time held by some of the defendants. The money

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sought to be recovered back was paid into court in proceedings for the foreclosure of the mortgage by which the bonds were secured. The bill also prayed, as alternative relief, that the complainant might be subrogated to the benefit of the decree of foreclosure of the mortgage. At the commencement of the suit the Milwaukee & St. Paul Railway Company was in possession of the railroad and other mortgaged premises, asserting itself to be the owner thereof, and was therefore made a defendant.

The facts, as stated in the bill, were substantially as follows:

The La Crosse & Milwaukee Railroad Company, in 1858, after giving the bonds and mortgage above mentioned gave two other mortgages, one on their road and one on their land grants, to secure certain other bonds issued by them. Failing to pay the interest coupons on the latter bonds, William Barnes, the trustee named in the mortgages, in May, 1859, sold the mortgaged premises, and all the franchises of the company at public auction, and became the purchaser thereof, in trust for the bondholders, under the laws of Wisconsin, for the sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars. The bondholders thereupon, in May, 1859, organized a new company by the name of the Milwaukee & Minnesota Railroad Company (the corporation now complainant in the case), and Barnes conveyed the property to the said Company; which thereafter conducted its business under and in pursuance of the charter of the La Crosse & Milwaukee Railroad Company, and immediately entered into possession of said property and franchises. But the prior mortgage of 1857 still subsisted on a portion of the road. Of this mortgage Bronson and Soutter were the trustees, and they filed another bill to foreclose their mortgage, and after protracted litigation (of which the

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part in this court, is reported in *Bronson v. La Crosse R. R. Co.*, 2 *Wall.* 283), obtained a final decree in 1865, for the amount of interest coupons due on the bonds secured thereby, amounting to upwards of four hundred and fifty thousand dollars; which decree contained a proviso, that if the Milwaukee & Minnesota Railroad Company (now complainants) should pay the amount of the decree before a sale of the mortgaged premises, the receiver (the road being then in the hands of a receiver) should deliver the property to them; that is to say, they had the usual privilege of redeeming the property by paying the decree. Thereupon, the complainants, on December 30, 1865, paid into court the amount of four hundred and sixty-two thousand fifty-seven dollars and eighty cents, as above stated, the money being afterwards distributed to the holders of the various bonds secured by the Bronson and Soutter mortgage, who are the individual defendants in this suit. The money thus paid was paid by the complainants as purchasers, and claiming to be owners, of the property, upon an acknowledged incumbrance, and in relief of the property claimed.

Prior to this payment, however, certain judgment creditors of the La Crosse & Milwaukee Railroad Company filed in the United States district court for Wisconsin a creditors' bill against the present complainants, alleging that the sale by Barnes was fraudulent and void, and praying that it might be set aside as such, and that the complainants might be enjoined from any further interference with the property or franchises of the La Crosse & Milwaukee Railroad Company. This suit had been pending for some considerable period, and was pending here on appeal—the case of *James v. Railroad Co.*, 6 *Wall.* 752,—when the complainants paid their money into court, as before stated; and, some time after its payment and distribution, a decree was made on said creditor's bill,

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in accordance with the prayer thereof, and directing that the property should be resold, and the proceeds applied, after payment of prior liens, to the satisfaction of the judgments on which the creditors' bill was founded.

The complainants accordingly now asked to have their money returned to them, on the ground that they paid it under a mistake. Their allegation was, that they supposed they owned the property when they did not; they supposed that they were lifting an incumbrance off of their own property when they were, in fact, lifting it off of property decided to belong to other parties. Their bill, speaking of the order allowing them to pay the amount of the decree, represented that "the said order was made by this court upon the understanding and theory entertained and believed by the judges of said court, and by your orator, and by all persons and parties interested in said cause, that your orator was the owner of said equity of redemption." And again, that "your orator paid said sum of money into this court; this court distributed the same; and the several persons hereinbefore named in that behalf received the same with, upon, and under, and only with, upon, and under, the belief, understanding, and theory, that your orator was the owner of the equity of redemption of the mortgaged premises and property in said cause, and that your orator was thereby paying and extinguishing a lien, charge, and incumbrance upon property owned by your orator as aforesaid." It further stated that "after paying the money, your orator for the first time discovered that the said foreclosure of the Barnes mortgage was fraudulent and void as to the creditors of the La Crosse & Milwaukee Railroad Company, and as against the said last-named company, and that, in fact and in law, your orator never was the owner of the said equity of redemption, and that

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the payment made by your orator into court, and the distribution of the said moneys and the receipt thereof by the said defendants, was made, had, and received in mistake of fact as aforesaid." The bill further stated that Russell Sage, one of the defendants, who received a large portion of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and had advised and encouraged the sale by Barnes, and participated in the organization of the complainant's company; and alleged further, that the board of directors of the corporation complainant became totally changed, and was, at the time of such payment, wholly composed of persons who had not participated personally in the foreclosure of the Barnes mortgage; and that a large majority of the stockholders and directors at the time of the said payment were persons who had no interest at the time of the foreclosure, and no participation in the proceedings. The defendants demurred to this bill, and on the hearing of the same the demurrer was sustained, and the bill dismissed. From the decree dismissing the bill, the complainants appealed.

G. B. Smith, and M. H. Carpenter, for the appellant.

J. W. Cary, for the appellee.

BRADLEY, J.—The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of

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property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He can not get relief by coming into a court of equity. By the civil law, the possessor, even in bad faith, may have the value of his improvements, if the real owner choose to take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity. One of the maxims of the latter system is, "He that hath committed iniquity shall not have equity." And various illustrations of it are furnished by the books. See *Francis's Maxims*, Maxim VII. But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse & Milwaukee Railroad Company; in other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs, but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property when they paid into court the money which they are now seeking to recover back. They are wrong, also, in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law. They mistook the legal effect of transactions of which they were chargeable with notice. They were the persons for whose benefit the purchase was made, which was

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declared to be fraudulent. They were the principal defendants in the creditors' bill, upon which this decree was rendered. All the evidence in that suit had been taken when they made the payment in question. The cause was pending, on appeal, in this court. There was not a fact, therefore, of which they were ignorant. They had full and actual notice of all the transactions, and all the evidence on which the decree was ultimately founded. All this appears from the statements of the bill in this case. We do not see how such a bill can possibly be sustained. The pleader who drew it evidently felt the force of these objections, and interjected some special circumstances for the purpose of showing that the case is distinguishable from the class of cases referred to. It is stated that Russell Sage, one of the defendants, who received a large portion of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and advised and encouraged the sale by Barnes, and participated in the organization of the complainants' company. All these facts may be true, and on the demurrer to the bill must be taken as true; but they do not show, nor is it alleged, that Sage was personally a participant in the fraud which was committed in the sale under the Barnes mortgage. And if it were so alleged, can one fraud-doer obtain relief in equity against his *particeps criminis*?

Again, it is alleged that the board of directors of the complainant was totally changed, and was, at the time of such payment, wholly composed of persons who had not participated personally in the foreclosure of the Barnes mortgage; and that a large majority of the stockholders and directors at the time of the said payment, were persons who had no interest at the time of the foreclosure and no participation in the proceedings. This can not alter the case. A corporation aggregate retains its identity through all the changes

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that may take place in its individual membership. This corporation, by its own statement, was adjudged to be the child of a fraudulent and corrupt transaction, and entered upon its career as purchaser of the property, with all the risks of its illicit origin and fraudulent purchase upon its head. Change of membership can not change its rights. If it can, when is the change effected? How many, or what proportion of the members must be changed?

It is needless to pursue the subject further. If the present individual stockholders of the complainants have been wronged, that wrong can not be redressed in this proceeding without violating the clearest principles of equity jurisprudence. The bondholders who received the money that was paid into court were entitled to that money. It was due them. Had not the complainants interposed, they could have sold the property and realized their claim from the proceeds. How can they be called to account? The present owners of the road have purchased it (it is to be presumed) under the proceedings had in favor of the judgment-creditors. How can their title be disturbed by the complainants? What equity would there be in subjecting the property in their hands to an incumbrance from which it was free when their purchase was made?

The decree must be affirmed.

CHASE, Ch. J., and FIELD and MILLER, JJ., dissented.

Others concurred.

Decree affirmed.

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RIBON v. THE CHICAGO, ROCK ISLAND, &
PACIFIC RAILROAD COMPANY.

16 Wallace, 446.

*Supreme Court of the United States ; December Term,
1872.*

Mortgages. Foreclosure. Parties. A bill filed by stockholders and creditors of a railroad company to set aside a sale of the railroad under an amicable foreclosure of a certain mortgage upon it, effected with the consent of a majority of the stockholders and creditors, which charged collusion in the sale, and prayed for a resale,—*Held*, fatally defective for want of proper parties, because neither the trustees in the mortgage foreclosed nor the consenting stockholders were made parties.

Appeal to the supreme court of the United States from the circuit court for the district of Iowa.

This was a suit in equity by Ribon and others, stockholders and creditors of the Mississippi & Missouri Railroad Company, against that company and the Chicago, Rock Island, & Pacific Railroad Company, to set aside as collusive and fraudulent a sale of the road of the former company to the latter company, through an amicable foreclosure.

The bill alleged that there were numerous stockholders of the Mississippi & Missouri Railroad Company, and also numerous bond creditors, secured by five different mortgages; that an agreement was entered into between a majority of these stockholders and bondholders and a company called the Chicago &

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Rock Island Railroad Company, by which the road of the Mississippi & Missouri company should be sold to the Chicago & Rock Island company, and the proceeds divided among the stockholders and bondholders of the former company; that as several of the stockholders and bondholders of that company dissented from the arrangement, an arrangement was made by the majority of the stockholders and the trustees under the different mortgages, under which an amicable foreclosure suit was brought by the trustees in one of the mortgages, making the trustees in the four other mortgages defendants with the company itself; and under a decree of foreclosure and sale the railroad was sold to a new company called the Chicago, Rock Island, & Pacific Railroad Company, being the former Chicago & Rock Island company, with a somewhat different organization, and a name so far changed as to have the addition of "Pacific."

The bill was filed by the complainants for themselves and such other dissenting bondholders and stockholders as should choose to become parties and contribute; and it prayed that the sale might be set aside; that the property might be resold under the decree; that the money arising from the sale be applied, first, to the payment of the bonds of the complainants and of any dissenters who might come in, and be afterwards applied upon the stock of the complainants and of any dissenters who might come in; and for other and further relief.

It made both the company purchasing, and the company whose road had been sold, defendants; but it did not make any of the stockholders through whose assent the trustees had acted, nor the trustees through whose act the scheme was charged to have been actually consummated, parties.

For these omissions, as of indispensable parties, the defendants demurred; and the court sustained the

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demurrer and dismissed the bill. From this decree the complainants appealed.

J. Grant, for the appellants.

T. F. Witherow, for the appellees.

SWAYNE, J. [After stating the facts of the case.]—This is an appeal in equity from the decree of the circuit court of the United States for the district of Iowa. The appellants are the complainants. A brief statement of the case as presented in the record will be sufficient for the purposes of this opinion.

The Mississippi & Missouri Railroad Company was incorporated to construct a railroad from Davenport, on the Mississippi river, to a point at or near Council Bluffs, on the Missouri river. It executed five mortgages to secure different sets of bonds, and issued stock in shares of one hundred dollars each, to the amount of three million five hundred thousand dollars. The company built a part of its roadway, and became greatly embarrassed. A large majority in interest of the bondholders and stockholders decided to sell all the property of the company to the Chicago & Rock Island Railroad Company, or to such other corporation as that company might designate to receive the transfer; and in order to pass the title it was determined to have the mortgages foreclosed and a sale made under the decree. The Rock Island company entered into the arrangement, and agreed to pay five million five hundred thousand dollars as the consideration of the sale. Payment was to be made in bonds as specified in the contract. The majority in interest of the bond and stockholders of the Mississippi company agreed among themselves as to the distribution of the fund. Such proceedings were subsequently had that under a decree in a suit in equity, wherein the

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trustees in one of the five mortgages were complainants, and the trustees of the other four and the Mississippi company were defendants, a sale was made to the Chicago, Rock Island, & Pacific Railroad Company for the sum of two million one hundred thousand dollars. Five and a half millions of the bonds of the purchasing company were nevertheless paid over according to the prior contract, and have been distributed according to the agreement among themselves, of the majority in interest of the stockholders and bondholders of the Mississippi company. The Chicago, Rock Island, & Pacific company is in possession of the property so sold to them, and operating the finished part of the road. It is not denied that the proceedings touching the sale are upon their face regular and valid.

The holders of the bonds of the Mississippi company, to the amount of one hundred and eighty-five thousand dollars and of six thousand shares of the stock, refused to become parties to the arrangements and proceedings of the majority in interest—never assented to the sale, and did not participate in the distribution of the proceeds.

The complainants are dissenting bond and stockholders. They filed this bill for themselves and such other dissenters as might choose to become parties and contribute to the costs of the litigation. The prayer of the bill is that the sale may be declared fraudulent and void; that the property may be resold under the decree; that the money arising from the sale be applied, first, to the payment of the bonds of the complainants and of the other dissenting bondholders who may become parties, and that the residue be applied upon the stock of the complainants and of such other dissenters as may become parties, and for other and further relief.

The appellees demurred to the bill, and assigned for cause, among others, the want of indispensable

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parties. The demurrer was sustained, and the complainants not electing to amend, the court dismissed the bill.

The want of parties is the only point we have found it necessary to consider.

The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons can not be reached by process—do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, can not be made parties—the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable. The act of Congress of 1839, and the rule of this court upon the subject, give no warrant for the idea that parties whose presence was before indispensable, could thereafter be dispensed with. The subject was fully considered in *Shields v. Barrow*, 17 *How.* 130. What is there said need not be repeated.

The rule that all to be affected by the result must be before the court is subject to certain exceptions. But they have no application to the case before us, and need not, therefore, be considered. The rule, as we have stated it, is well settled in equity jurisprudence. *Caldwell v. Taggart*, 4 *Pet.* 190; *Story v. Livingston*, 13 *Id.* 359; *Marshall v. Beverley*, 5 *Wheat.* 313; *Coy v. Mason*, 17 *How.* 580; *Russell v. Clark*, 7 *Cranch*, 69.

In the case before us, the two railroad companies were properly made defendants—the Mississippi & Missouri company because it was the mortgagor and the owner of the mortgaged premises up to the time of the sale, and because if the sale were annulled its title

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would be restored; the Chicago, Rock Island, & Pacific company, because it was the purchaser, and is in possession of the property under a claim of title. But the Mississippi & Missouri company has nothing at stake. It is without means, present or prospective. It has been stripped of all its property and effects, and only cumbers the ground.

The trustees in the five mortgages which were foreclosed should have been made parties. Their presence as such was indispensable. If the sale should be annulled, they might be in the situation of the plaintiff who collects a judgment which is afterwards reversed. He may be called upon to refund and compelled to do so. A question would also arise whether the consideration of the agreement under which the five and a half millions of bonds were paid had not failed, and whether all the bondholders and stockholders who participated in the distribution of the proceeds of the sale should not be required to refund. If either or both were too numerous for all to be brought before the court, some might have been made parties in their own behalf and as the representatives of the others. *Story Eq. Pl.* 7th ed. §§ 120-121, 128, 131, 132, and notes.

Dodge v. Woolsey, 18 *How.* 331, to which our attention was called by the learned counsel for the appellants, presents no material points of analogy to the case before us, and affords no support to this bill in the particular under consideration. The bill in this respect is fatally defective. We do not deem it necessary to pursue the subject further. The demurrer was properly sustained and the bill properly dismissed.

Decree affirmed.

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CHEEVER v. THE RUTLAND & BURLINGTON RAILROAD COMPANY.

Supreme Court of Vermont; November Term, 1869.

Mortgages. Practice in equity. The trustees under three successive mortgages of the property of a railway corporation filed a bill in equity against the corporation to settle and establish the powers and duties of the trustees and the relative position and rights of the mortgagees towards each other and towards the corporation in respect to the title, possession, and control of the property, and a decree was made in accordance with the prayer of the bill, but was never completely executed. *Held*, that the fact that this suit was still technically pending did not defeat a suit brought many years afterwards by the trustees under the first mortgage, to enforce their security against the second mortgage interest. The circumstances that many of the parties to the former suit were dead, that the former decree was dormant, and that it was repudiated by the second mortgage interest, as a fraud upon them, rendered proper an original bill setting forth the original cause of action as well as the suit and decree thereupon.

Trustees in a mortgage of the property of a railroad company, who appear and answer in a suit to enforce the security of a prior mortgage, thereby waive any defect in the service of process upon them. Their power to waive such defect is not affected by the fact that they are representative defendants.

In a suit in equity to enforce a railway mortgage security against second mortgage interests, holders of bonds of the railway company secured by such second mortgage who are not trustees under the mortgage are proper, but not necessary parties. And the fact that the bill filed is in the nature of a supplemental bill in a former suit does not render it necessary that all the bondholders who were joined in such former suit should be made parties.

A mortgage of the property of a railroad company, which is executed by the president of the corporation in pursuance of a vote empowering him to execute and deliver the instrument in the name of

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the corporation, but not directing where he shall execute it, is not invalid because executed in a state other than that in which the railroad is situated and by which the company was incorporated; especially where the validity of the deed has subsequently been recognized by the corporation.

Nor does the fact that such mortgage allows the trustees under it to be residents of such other state affect its validity, on the ground that such a provision is against public policy.

Where such a mortgage is both executed and made payable in such other state, it will not be deemed invalid, because the rate of interest fixed thereby is higher than is allowed by the laws of such state, if it is apparent that the parties intended to contract with reference to the laws of the state in which the railroad mortgaged is situated. Such intent is established beyond question by a specific reference in the instrument itself to a statute of the latter state allowing railroad companies to pay the rate of interest agreed upon. And interest after the maturity of the obligations secured by the mortgage should be allowed at that rate, not at the lower rate fixed by the general law. But the interest upon coupons not paid when due, as to which there is no stipulation by the parties, should be estimated at the ordinary legal rate.

Where trustees under a mortgage of a railroad are, by the express terms of the mortgage, authorized, upon certain conditions, to enter upon and manage the railroad for the benefit of their trust, subsequent legislation can not impair their remedy or force upon them a substitute for it. Holders of bonds secured by a second mortgage are liable, the same as the railway company itself, to be ousted from possession by the trustees of the first mortgage; and an act incorporating such second mortgagees, with others, into a new company, can not confer upon the new corporation any rights of possession conflicting with the rights of the first mortgage trustees under the original contract. Such an act of incorporation will not be construed as attempting to confer such rights if it is reasonably susceptible of any other interpretation.

The rights of the trustees under such first mortgage can not be waived by a majority of the holders of bonds secured by the mortgage. Their rights are for the security of the whole debt, not merely a majority of it. The fact that the security is ample does not affect the case.

Upon a bill in equity to enforce a trust, under a clause of a mortgage of the property of a railway company, providing that the trustees under the mortgage might pursue their security by entering upon, managing, and controlling the railroad, until the debt secured

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should be paid from the earnings of the road or otherwise,—*Held*, that as, upon all the circumstances of the case, nothing was shown to defeat the perfected right of the plaintiffs, under the terms of their deed, to the possession, and to hold it until their debt should be paid, the defendants were not entitled, on a merely general allegation that an accounting was necessary, to retain possession until an account could be taken, and until the expiration of a day of redemption to be fixed by the court. Such a delay, although proper upon a bill to foreclose, is inconsistent with the remedy stipulated by the parties, and sought by the plaintiffs, and would be a denial of the plaintiffs' just rights.

But where it appeared in such a case that payment of the debt secured would probably be made without delay, and that the transfer of so large a property would involve considerable expense and might tend to retard instead of hastening payment,—*Held*, that the transfer might properly be delayed a reasonable time to enable the defendants to make complete payment.

Appeal to the supreme court of Vermont from a *pro forma* decree of the chancellor.

This was a suit in equity by James Cheever and William T. Hart, as trustees of a first mortgage upon the property of the Rutland & Burlington Railroad Company, and Jacob Edwards, Jr., Joseph M. Wightman, Dwight Foster, George C. Lord, William Thomas, J. Amory Davis, and Paris Fletcher, against the Rutland & Burlington Railroad Company, Edwin A. Birchard, John B. Page, John W. Stewart, David A. Smalley, Albert L. Catlin, George B. Gibbons, Ephraim A. Chapin, the Bank of Bellows Falls, John B. Taft, John S. Eldridge, William Minot, Jr., Benjamin T. Reed, Harrison Fay, Southworth Shaw, William G. Billings, and Benjamin Thaxter. The suit was brought to enforce a security given by the terms of the mortgage by the railroad company, under which the plaintiffs Cheever and Hart claimed, as trustees under the mortgage, the right to enter upon and manage and control the road until the mortgage

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debt should be satisfied, from the earnings of the road or otherwise. The questions arising in the case are stated in the opinion.

George F. Edmunds, E. R. Hard, Dwight Foster, and George W. Baldwin, for the plaintiffs.

Luke P. Poland, Levi Underwood, Daniel Roberts, John Prout, W. C. Dunton, and Charles C. Dewey, for the defendants.

E. J. Phelps, and George O. Shattuck, for the shareholders in the Rutland Railroad Company.

STEELE, J.—In 1851 the Rutland & Burlington Railroad Company executed a deed of trust and mortgage, to secure an issue of corporation notes or bonds, to the amount of eighteen hundred thousand dollars. This deed was called the “first mortgage.” After about two years, the company executed their “second mortgage.” This was to secure another issue of notes or bonds, amounting to twelve hundred thousand dollars. A “third mortgage” was afterwards made. The “second bondholders” foreclosed their mortgage, and by extinguishing the third mortgage and absorbing the corporation became the owners of the entire franchise and property, subject, however, to any rights secured to the “first bondholders” by the first mortgage. The object of the prosecution of this cause is to enforce the security of the “first bonds.”

The object of the defense of this cause is to defeat the enforcement of that security. The only parties to the main case to be substantially affected by any decree are the first mortgage interest, who, through their trustees Cheever and Hart, are orators, and the second mortgage interest, who, through their trustees Birchard and Page, are defendants.

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Practically, they are the only parties to this case as originally instituted.

Many years ago, before the second bondholders had foreclosed their mortgage, the respective trustees of the three successive deeds of trust and mortgage joined as orators in a bill against the corporation, praying the court of chancery to settle and establish the powers and duties of the trustees, and the relative position and rights of the three mortgages towards each other and towards the corporation in respect to the title, possession, and control of the property. In 1855, a decree was made in accordance with the prayer. By the terms of that decree, the first mortgage interest have, if the decree was valid, been entitled, since 1863, to the possession and control of the road, to operate it until their bonds should be paid by the earnings of the road, or otherwise. The second mortgage trustees did not in 1863 surrender the road to the first mortgagees, but have held and operated the road themselves, and still refuse to either surrender the possession or pay the debt.

The orators claim relief by virtue of the said decree of 1855, or, if that decree is not conclusive, they claim the same relief by virtue of the first deed of trust and mortgage. The defendants insist that both the decree and the deed are invalid. Certain questions are also raised by demurrer and by a motion to dismiss. The facts of this case are voluminous, and have to be gathered from a mass of over two thousand pages of printed matter; consequently, we shall consider the points raised in the order which will require the least repetition of statement, although it will not, in all instances, conform to the natural or logical order. At the best, on account of the great number of questions involved, an opinion in this case will be of unusual length. Many of the material facts in the history of this controversy are stated in Cheever and

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Hart v. Rutland & Burlington Railroad Company, and Fletcher v. Rutland & Burlington Railroad Company, both reported in 39 Vt. 634, 654.

I. (1.) *Is this suit defeated by the pendency of other suits, and particularly of the suit in which the decree of 1855 was made?*

The pendency of prior suits for the same cause of action does not as a matter of equity law necessarily defeat a suit in chancery. If the subsequent suit is unnecessary and vexatious, it will be dismissed; but where two or more proceedings are commenced in chancery for the same cause of action, and the last, as in this case, seems best calculated to lead to a decision upon the merits, it will not be dismissed on account of the pendency of the prior suits. Sometimes the cases are referred to a master to ascertain and report which is best calculated to settle the controversy, and sometimes it appears upon the very face of the papers without a reference. Crofts v. Wortley, 1 Ch. Cas. 241; Rump v. Greenhill, 20 Bear. 512; Daniel Ch. Pr. 657, 661; Daniel Ch. Forms, 503; Hertel v. Van Buren, 3 Edw. (N. Y.) Ch. 20.

(2.) *Here it is sought to supplement, revive, and execute the decree of 1855. Does this make an original bill irregular?*

Technically, the suit of 1855 was pending when this was commenced. Substantially, it was ended by the decree of 1855. What remained to be done was by way of execution, and not by way of adjudication. That suit was professedly and really an amicable proceeding. All three classes of creditors were orators. The debtor, the corporation, was defendant. This is an adversary proceeding between parties who stood as co-orators in that. It is much less awkward for the litigation to be pursued in this new suit, in which the parties assume their proper attitude upon the record, the first mortgagees as orators and the

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second mortgagees as defendants, than it would be to pursue it in a proceeding in which they stood as co-orators. Before the institution of this suit, the second mortgage interest had repudiated the decree of 1855. That decree was dormant. The parties were many of them deceased. The first mortgage interest desired to revive it. So far their proceeding would have to be in the nature of a bill of revivor. They also wished to state new matter, and summon new parties. Their proceeding would therefore need also to be supplemental in its nature. It was competent to proceed in the suit of 1855 for both these purposes; but there was another view of the case which made an original suit especially proper. The second mortgage interest claimed that the suit of 1855 was instituted without authority from the parties named as orators therein by representation; that the very inception of that suit was a fraud upon them, and that it should be dismissed for that reason, without inquiry into the substantial rights of the parties in respect to the subject-matter of the controversy; that these questions could only be determined in a suit legitimately commenced. This pretended fraud was not only charged by the second mortgage interest before this suit was commenced, but is here alleged, and in their answers, upon oath. The first mortgage interest naturally desired to conduct their litigation in such a manner that, in case the second mortgage interest should prevail in their allegation as to the fraudulent inception of the suit of 1855, the first mortgagees would still stand upon a bill which would unquestionably entitle them to a decision upon the merits of their case. To accomplish this, they bring an original bill which sets forth the original cause of action, as well as the suit and decree of 1855, which they desire to revive and supplement. They in effect pray the court in the bill to settle their rights in this suit, even if the first suit would not warrant a

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decree upon the merits. At the same time they do not abandon the benefit, if any, secured them by the adjudication of 1855. In other words, they bring a bill which in one proceeding exactly states their whole case, and submits the whole of it at once to the court.

It would be a sad reflection upon the court of chancery if its rules were so artificial and unreasonable as not to permit this. The forms of proceeding in chancery have always been believed sufficiently flexible to meet the requirements of justice, and an original bill like this, reviving and supplementing another, is in our judgment regular and legitimate, and warranted by authority and precedent. Several cases are mentioned in *Mitford Equity Pleading*, where such bills are permissible, and upon grounds similar in principle to those urged in this case. "The bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which in its consequences may draw to itself the advantage of the proceedings on the former bill." *Mitford Eq. Pl.* 97, 99. The substance of the doctrine is, that an original bill is proper where it is necessary in order to protect the rights of the parties and avoid the peril of an adjudication, which shall not reach to the merits and substance of the controversy. We think that the frame of the bill before us was precisely what the case demanded.

II. *Was the bill defective in its service, its parties, or its description of the mortgaged property?*

(1.) As to the service and parties. Among the persons named as defendants by the bill are: William Minot, Jr., Southworth Shaw, William G. Billings, and Benjamin Thaxter. It is stated in the defendants' brief that no attempt was made to serve the bill on the said Minot, Shaw, Billings, and Thaxter, and that neither of them appeared and answered. We

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assume that this is a correct statement. They are not, then, to be treated as parties any more than if their names were not mentioned as such in the bill. If they had appeared, they would probably have been proper though not necessary parties to the proceeding.

(2.) There are other defendants named in the bill upon whom the service is confessedly regular, namely: The Rutland and Burlington Railroad Company, John W. Stewart, trustee of the second bonds, John B. Page, successor of said Stewart, David A. Smalley, Albert L. Catlin, George B. Gibbons, Ephraim A. Chapin, and The Bank of Bellows Falls.

(3.) There is another class of defendants upon whom service was made in the manner prescribed by the chancellor, but in a manner which is claimed to have been unauthorized by law. The defendants of this class are Edwin Birchard, trustee of the second mortgage bonds, John B. Taft, John S. Eldridge, Benjamin Reed, and Harrison Fay. All of these defendants, except Harrison Fay, appeared and pleaded or answered. None of them, except Fay, attempted by a motion to dismiss or otherwise to take advantage of the supposed defect in the service. Having thus appeared and pleaded or answered without taking exception to the mode of service, it is too late for them now to raise this objection. They have waived it so far as it was in their power to do so. It is urged that it was not in the power of these defendants to waive any such irregularity, because they are representative defendants. This proposition is not sound. If they sufficiently represented the whole second mortgage interest to make their defense upon the merits conclusive upon that interest, still more clearly would their defense upon mere technical points be conclusive upon that interest. The defendant Edwin Birchard is a necessary defendant. He, in con-

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nection with the other trustee, is the duly constituted agent and trustee of the second mortgage interest, vested with the power and duty to conduct and defend the suits which affect that interest. Having this power and responsibility, it would be very singular if he was without power to accept service of process upon him as trustee. If he could accept service, he could waive a defect in the service. There is no suggestion that these defendants are not proper representatives of the second mortgage interest, or that their waiver of any supposed defect in the service was in bad faith, or even prejudicial to the interest they represented. We think that the defendants Birchard and Page are the principal necessary defendants, and are the legal and actual representatives of the second mortgage interest, authorized to represent the second bondholders in matters of substance, and still more in matters of form.

(4.) Several bondholders, not trustees, are properly joined as defendants, though they are not necessary parties. In a case in Massachusetts, upon a deed like this, a demurrer was filed upon the ground that the bondholders were not joined as defendants. The court there held that the trustees were the only necessary defendants, and that none of the bondholders need be joined as defendants. The authorities upon this point and the reasons of the rule are ably reviewed and stated in the opinion of BIGELOW, J., in that case. See *Shaw v. Norfolk County R. R. Co.*, 5 *Gray (Mass.)* 170-1. The only purpose served in this case by joining individual bondholders as defendants is to assure the court that there is such publicity to the suit as will shut the door to collusion, and secure as full a defense as the facts will warrant. Of all this we are assured. The case before us carries upon its face conclusive evidence that the defense has been prosecuted with thoroughness and fidelity, and we are relieved of any appre-

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hension that the second trustees are conceding away the rights of their *cestuis que trust*. It is suggested that all the individual bondholders who were joined as proper defendants in the suit of 1855 are necessary parties to this suit, because it is in the nature of a supplemental bill. But in a bill like this, it is not necessary that merely proper parties in the former suit should be joined as orators or defendants. Any party interested in the enforcement of the former decree may bring his bill, and bring it against the parties who represent the adverse interest at the time the new bill is brought. This is well settled where the matter in controversy has been assigned, and it is still more clearly correct where the suit is brought by and against representative parties, and there has been a change in the representation. The object of joining individual bondholders has been already referred to. The accomplishment of that object does not necessarily require that any, and much less the same individual bondholders, should be made parties to the new bill.

(5.) The defendant, Harrison Fay, has not waived any defect there may be in the service. As he is only a proper, and not a necessary party, even with respect to his own bonds, the court have thought best to allow the bill to stand dismissed as to him, according to his request, without any expression of opinion upon the question of the sufficiency of the service upon him. In my own judgment it was sufficient, but I am not authorized to express any opinion on the point as the judgment of the court. The bill is therefore dismissed as to the defendant Fay, without costs.

(6.) *As to the description of the mortgaged property.*

We are not prepared to say that, in a chancery proceeding of this kind, a reference to the town records may not be allowed to aid an otherwise imperfect description; but in this case, we think that independ-

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ently of all the references to the town records, the property is definitely and unmistakably described by its name and general location and the other terms of description which are employed.

The result of our conclusions on this branch of the case is, that the bill, in all material respects, is sufficient as to its parties, service, and description, as well as regular and authorized in its form.

III. *As to the first deed of trust and mortgage and its trustees.*

(1.) *Is the deed invalid because executed in Massachusetts?*

The corporation, at a duly warned meeting held in Vermont, February 6, 1851, voted to issue notes or bonds to a certain amount, and to secure the purchasers or holders of them by a deed "in trust or mortgage of the railroad and its franchise." A draft of such a deed was submitted to the meeting and approved. Timothy Follett, the president, was by vote instructed and empowered "to sign, seal, execute, and deliver said instrument in the name of the corporation, and the same to acknowledge in behalf of the corporation." All this Mr. Follett did in precise accordance with the vote. The vote, however, did not direct him where to execute the deed, and he did it in Massachusetts, before a Vermont commissioner. There is, upon this state of facts, no significance to be attached to the place of the formal execution of the deed. It was, though executed elsewhere, a Vermont conveyance and transaction, and binding upon the corporation which authorized it. But, even if this were not so, the irregularity, if any, can not now be alleged, for the deed has since been fully adopted by the corporation. As soon as it was executed, the corporation proceeded to issue bonds, and to throw them into market, and to sell them as secured by this deed. The avails of the sales the corporation appropriated to

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their uses in Vermont. In subsequent deeds, upon which the defendants here stand, the corporation recognize the validity of this conveyance in the most solemn manner. So, too, in their published reports, and in many other ways. It is too late for them now to repudiate it. If too late for the corporation, the defendants in interest stand on no better ground. The basis of their title, the second mortgage, is, by its own terms, subject to the "provisions, trusts, and liens" imposed and created by the first deed of trust and mortgage.

(2.) *Is the deed invalid by reason of its provision as to the residence of the trustees?*

The deed, by implication, requires the trustees to be residents of Massachusetts. It is urged that it is contrary to public policy to suffer a board of trustees, who may come into the management of a Vermont railway, to be made up of non-residents, and that therefore the deed is void. We are not at all certain that public policy in any sense, even the most narrow, would be promoted by limiting the right to control and manage railways to residents of our own state. As the state has been situated, the success of its railway enterprises has depended somewhat upon securing the aid of foreign capital. It has, very possibly, tended to encourage such investments by capitalists in other states, that the property could, to a great extent, remain under their own management, or that of parties near them and in the same interest. Without, however, undertaking to decide this question of state policy, which pertains to the legislature and not to the courts, it is very clear that the provision is not against public policy in any such sense as would affect the validity of the contract. It is not like a contract in restraint of marriage or trade, or against good morals, or in violation of law, or like any of that class of agreements which the law declares void as against

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public policy. This stipulation as to residence was merely an innocent provision, made to answer the convenience of the parties, and one which the parties in absence of any legislation forbidding it were at entire liberty to make. But even if this were otherwise, if this stipulation was invalid, it would not defeat the conveyance. Nor would it affect this suit, for so far as the contract merely *suffers* the trustees to reside out of the state, it is unquestionably lawful. That part which *requires* them to reside out of the state we are not asked to enforce in this action.

(3.) *Was the second mortgage a first lien on any of the rolling stock?*

The defendants' proposition of law on this subject we have no occasion to discuss, for upon the proof we are unable to find the facts upon which it could apply. The testimony fails, as we think, to show that the second mortgage securities were negotiated upon any agreement with the holders of prior securities, or upon any representation by them, or even by strangers, that the second mortgage would be a first lien upon any property. Indeed, the testimony from the defendants' own witnesses, Lee, Dugald Stewart, and Fay, tends to establish the contrary. That some of the holders of second bonds indulged in some expectations in this respect is doubtless true. But these expectations resulted, not from any agreement, but from certain speculations as to the law, independent of any agreement by the parties.

(4.) *Are Cheever and Hart trustees under the first deed of trust and mortgage?*

The deed provides the mode in which the successors to the original trustees, Hooper and Haven, should be selected. The defendants claim that these provisions of the deed have not been strictly followed in the transmission of the trust from Hooper and Haven through others, to Cheever and Hart. It seems that

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doubts on this point arose prior to this suit. To settle these doubts, application was made to the court of chancery, in Windham county, at the April term, 1863, and proceedings were had which resulted in a decree confirming the appointment of Cheever and Hart as trustees. The defendants deny the validity of this confirmation. Upon examination, we find no fatal irregularity in this decree, or in the proceedings upon which it was founded. The statute of November 10, 1857, did not, as claimed, require notice in this class of proceedings to be published in the daily papers. That provision as to notice applies to a different class of cases. Nor was it necessary for every individual bondholder to be made a party and notified. This would be impracticable. It was the duty of the court to see to it that service was made upon different beneficiaries under the trust, so as to insure a full and fair representation of that interest. This was done. The grantor of the deed of trust was also properly notified. All parties who, upon the instrument creating the trust, appeared to be interested in it, were before the court. That others holding subordinate and subsequent liens were not notified does not invalidate the decree. Their interests were not prejudiced. It appears that all parties interested acquiesced fully in the appointment of Cheever and Hart, both before and after their confirmation. On the hearing, no one objected to the confirmation. This was not by reason of any fraudulent collusion, but because no one had any objections to make. The proof fails to show any fraud, or that the right or interest of any party was endangered.

It is claimed that this application for confirmation should have been presented in the so-called "Ellis Gray Loring suit," in Rutland county, in which the decree of 1855 was made. This proposition stands mainly upon the assumption that the court of chancery in Rutland county were, at that time, through the

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decree of 1855, actually administering this trust. In point of fact the court were doing nothing of the kind. They were not executing the decree. They had not caused the property to be delivered to the use of this trust. The decree was dormant. Even if the court of chancery in Rutland county had, in fact, been administering the decree of 1855, so that it was irregular to make this application elsewhere than in that case, it would by no means follow that the decree of the court in Windham county would be void. It was a matter confessedly within the general scope of the jurisdiction of the latter court, and the proceeding was without fraud and on sufficient notice. The decree is therefore valid, notwithstanding the existence of special reasons, growing out of the peculiar situation of this particular trust, why the petition should have been heard elsewhere. Such objections are of no force after judgment. This confirmation, then, in our view, settles that Cheever and Hart are the legitimate successors of Hooper and Haven, as trustees, vested with the same powers, and subject to the same duties.

Holding thus as to the decree, it is needless to examine whether by reason, either of original regularity or of subsequent acquiescence, the appointment was valid without confirmation.

IV. *As to the interest and currency.*

(1.) *Was the stipulation for interest at seven per cent. valid?*

The defendants insist that these securities can draw but six per cent. interest, although they call for seven per cent. Six per cent. is the highest rate generally allowable under the laws of either Vermont or Massachusetts; but by a special statute of Vermont, railway companies were suffered to issue securities bearing a rate not exceeding seven per cent. There was no such statute in Massachusetts. Whether, therefore, the recovery is limited to six per cent. or extends

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to the contract rate depends on whether the rights of the parties under this contract are to be governed by the laws of Massachusetts or by the laws of Vermont. On the part of the defendants it is very ably and forcibly urged that the fact that the written contract was dated or executed, and also payable at Boston, in Massachusetts, is not merely *prima facie*, but absolutely decisive of the *locus* of the contract. Upon the unquestioned authority of many well-considered cases, the mere fact that such securities are issued payable in some commercial city of another state does not necessarily subject the contract to the operation of the usury laws of that state. The reason is, that the situation of the parties and of the subject-matter of the contract may conclusively show that the parties contracted in good faith with reference to the law of the state where the security was located, and fixed upon some commercial center as the place of payment, merely for the convenience of the holders of the loan, who, in such cases, are often widely scattered and continually changing. Upon the same reasoning, in contracts where no place of payment has been named, the place of the date or execution of the writing is held to be only *prima facie* evidence of the *locus* of the contract. The history and nature of the transaction may show conclusively that the parties hit upon the place to execute the papers by chance, or selected it merely on account of some passing convenience; while they, in good faith, made the contract with reference to another state and its laws. The same reasoning and principle which require the clear and *bona fide* intention of the parties to the contract to prevail over the presumption to be derived from either the place of its date or the place it names for payment suffer it also to prevail over the presumption to be derived from both. There is no inflexible rule of law which makes the presumption from either or both con-

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clusive. Usually the fact that an instrument in writing is executed at a particular place, and also by its terms payable there, is very strong evidence that the parties contracted with reference to that place. The mere fact, standing alone, that the *situs* of the security for its fulfillment is elsewhere will not overcome such evidence, though in a more doubtful case that fact would be important to be considered upon the question of the intent of the parties. But there may be cases where it will be apparent and certain that the contract is made, and in the utmost good faith, with reference to the law of the place where one of the parties has his domicile and the property its *situs*, and not with reference to the law of the place where the contract is signed or dated and payable. In the case before us, it is not only true that the parties understood that the value of the loan consisted in its Vermont security, which could only be effectually pursued in Vermont, where the corporation and the property were located, but it is also true that the entire contract, as well that part relating to the principal and the security as that part relating to the interest, depended for its life and authority solely upon the statutes of Vermont. Whether these facts and the surrounding circumstances would be sufficient of themselves to show this to be a Vermont transaction we need not say, for in this case we are not left to inference. An examination of the written contract itself and its references puts it beyond question that it was made with reference to the laws of Vermont, and those laws were, so far as material to this question, a part of the contract. Each note or obligation included in the loan refers to the deed by which it is secured, which deed, upon its face, professes to rest upon the vote of the corporation, passed at their meeting held in Vermont, February 6, 1851, pursuant to a call, recited in the record, to meet and "determine

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whether they will authorize the issue of bonds agreeably to the provisions of an act of the legislature of Vermont, approved November 9, 1850." This act, among other things, provides that railway corporations may issue their "notes or bonds" "bearing such a rate of interest, not exceeding seven per cent., and secured in such a manner as they may deem expedient." It follows inevitably, therefore, that the contract was made, not only with a general reference to Vermont law, but, beyond that, with a specific and declared reference to this particular statute, authorizing a contract for interest at seven per cent. *Vt. Comp. Stat.* 194, § 13.

(2.) *Is more than six per cent. recoverable for the period since the maturity of the debt?*

These obligations matured in 1863. It is urged that since the maturity of the debt interest is allowable as damages only, and therefore at the usual rate, and not the contract rate. What were the damages? The actual direct damage was the value of the use of the money. The parties agree in their contract that seven per cent. is that value for the time therein named, and at maturity the debtor refuses to return the money. Being thus in fault, he is in no position to claim the rate should be varied in his favor. While he retained the money according to the contract, he was bound to pay seven per cent. While he retained it contrary to the contract, he is bound to pay no less. By retaining it without the assent of the creditor, he indicates his satisfaction with at least as high a rate as he stipulated to pay. The party not in fault might, perhaps, after maturity, insist upon the usual legal rate, if that were more favorable to him than the contract rate. The creditor might, perhaps, urge in such cases that he agreed to less than the usual rate for but a limited period, and if the debtor refused to pay at the end of that period, the money should draw

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the usual rate for the time it is retained in violation of the contract. However this may be, there would be neither equity nor reason in lessening a lawful contract rate in favor of the party who is retaining the money without right. The same principle which we apply in this case is applied every day to notes which vary from the usual course by a stipulation to pay the interest annually. In judgments upon such notes, annual interest is uniformly computed, as well for the period after maturity, as for the period before. In other words, the contract is, in such cases, allowed to control the mode of computing interest as damages.

(3.) *Is interest recoverable upon the coupons, and if so, at what rate?*

The contract calls for interest at the rate of seven per cent. per annum, payable semi-annually. The attachment of interest warrants or coupons in no material respects affects the extent of the obligation. They may have some significance, as throwing upon the holder the necessity of presenting them or accounting for their non-presentation, as was done in this case, before he can enforce the payment of his interest. These coupons are simply convenient vouchers to be presented by the creditor, and passed to the debtor on payment of the interest called for by the contract. Precisely the same amount of interest, at precisely the same day, would have been due if there had been no coupons. The right, therefore, to interest on the sums represented by the coupons stands upon the same ground as the right to interest upon interest in ordinary contracts to pay interest annually or semi-annually. The borrower did not agree to pay any interest upon interest, but he did agree to pay his interest as due. Not paying it, he is bound, as in the breach of ordinary money obligations, to pay as damages simple interest on the sums he should have paid

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at the end of each half year, and there being no stipulation between the parties as to this interest, it will be computed at the rate of six per cent.

The result of our conclusions upon the subject of interest is, that the interest upon the securities in question should be computed at the contract rate until paid; that is, at the rate of seven per cent. per annum, payable semi-annually, the sums, whether expressed in coupons or not, due at the end of each half year as interest on the principal sum, being allowed simple interest at six per cent. from the time they are thus severally due until they are paid.

(4.) *As to payment in gold.*

In this connection we may refer to the point made by the orators, that they are entitled to payment of these bonds in gold. We do not propose to enter into a discussion of the constitutionality of the so-called legal tender act. It has uniformly been treated as constitutional by this court. We see no occasion to depart from the established course of our decisions in this respect. No decree for payment in gold will be made. *Carpenter v. Northfield Bank*, 39 Vt. 46.

V. *As to the petition of Jacob Edwards and others, and as to the cross bill.*

It appears by the proofs, under the petition of Jacob Edwards and others, that before the principal case was heard, but after the testimony was closed and it was ripe for hearing, the second mortgage bondholders organized themselves into a corporation, called the Rutland Railroad Company, under an act of incorporation, approved March 28, 1867. The second mortgage before that time had in effect absorbed the title of the old corporation, and extinguished the third mortgage so as practically to own the whole road, subject only to the interest secured by the first deed of trust and mortgage. To extinguish this lien so far

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as possible, the new corporation, as authorized to do, issued preferred seven per cent. stock, which they offered to any first mortgage bondholders who would accept it in exchange for their bonds. Very many immediately accepted the proposition. Others from time to time afterwards followed the example, until finally a majority of the first mortgage bonds were exchanged for preferred stock in the new company. The preferred stockholders, Jacob Edwards and others, by leave of court, file their petition in this cause, and prove the facts above stated, and pray that their interests may not be prejudiced by any decree made in this cause. They claim that if the first mortgage interest is entitled to prevail in this suit, the possession of the road should by decree be transferred, not to the trustees, Cheever and Hart, but to the new corporation, the Rutland Railroad Company, who, it is urged, are the proper trustees, both by legislative appointment and by the choice of a majority of the first mortgage interest; and that the road can not be transferred to other hands consistently, either with the public good or the just rights of the parties. Precisely the same claim is preferred on the part of the defendants by the second mortgage interest, who are now the holders of the common stock in the new corporation. The Rutland Railroad Company is not nominally before us as a party to claim possession; but its constituent elements, the preferred stockholders, and the common stockholders, who together make the corporation, are before us, and their united request is not less forcible than would be a demand by the corporation in its own name. In respect to this matter of possession, two prominent questions arise in this connection, one as to the effect of the act of March 28, 1867, and the other as to the effect of the large exchange of bonds for preferred stock; and these two questions are quite independent of each other.

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(1.) *Does the act confer upon the second mortgage bondholders, whom it incorporates, the right to the possession of the road as against the trustees under the first deed?*

The trustees of the first deed are, it should be remembered, by the express terms of their deed from the corporation, clothed with authority, upon conditions which happened in 1854, to enter upon and manage the road for the benefit of their trust. If the decree of 1855 is to be regarded as a merger of the rights of the first mortgage—and if so, it must be also a merger of the rights of the second mortgage—then in the words of that decree “the trustees under said first deed are authorized and empowered to enter upon and take possession of all the property to be held and administered upon by the trustees under said deed according to the terms and conditions contained in said first deed and under the order and direction of this court, unless the obligations secured by said first deed shall be paid and satisfied.” By this decree, the trustees do not lose the benefit of any of “the terms and conditions of their deed.” So that, whether standing upon the deed or the decree, the trustees of the first deed were, after 1863, lawfully entitled to the possession of the road. The second bondholders, by their deeds, which were all subsequent to the first mortgage, acquired only what title was left in the original corporation after their deed to the first trustees. They stood, in respect to the mortgaged property, in the shoes of the original corporation, and were subject to the same liability to be ousted from its possession. It is now claimed that they have been relieved from this liability by an act of the legislature. Would such an act be constitutional? If it was entitled “An act to excuse and relieve the second mortgage bondholders of the Rutland & Burlington Railroad Company from their liability to yield the posses-

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sion of the road to the trustees of the first mortgage," and if it proceeded in terms to enact that the first trustees should not assert the rights of possession secured to them by deed, its unconstitutionality would be obvious. It is true that this right to the possession is in the nature of a remedy, being only a mode by which the creditor might bring about the payment of his debt. But such a remedy, appointed by the contract and involving not mere matters of procedure in court, but the use and appropriation of property, becomes a matter of substantial right. Subsequent legislation can not impair it or force upon the parties a substitute for it. Nor would the case be altered by a provision that the second mortgage bondholders, incorporated as the Rutland Railroad Company, should hold the possession as the trustees of the first mortgage. The contract provides that the creditors may remove the debtors from possession, and take it themselves. The legislature can not nullify this stipulation, and secure to the debtors the possession, by the simple device of first incorporating them and then appointing the incorporated debtors the trustees of the creditors. Besides other objections to which such a scheme would be open, it would involve an utter disregard of the contract mode of selecting the trustees. Already it has been held by this court, in *Fletcher v. Rutland, &c. R. R. Co.*, 39 *Vt.* 633, with reference to this very deed, that the legislature could not by statute authorize a majority of the bondholders to remove the trustees. Still less could the legislature themselves remove them. The mode of appointing the trustees agreed upon in the deed is a substantial part of the contract, and can not be impaired by legislation.

Nor is this matter affected by the constitutional right and duty of the legislature to compel railways to be operated with a proper regard to the public convenience. This is not to be effected by a legislative

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choice of managers, followed by vesting them with the possession of the roads against the contract rights of others not in fault. Nor is this matter of the administration of a railroad so immaterial a matter that a contract relating to it, as a mode of securing a debt, may be impaired with impunity. On the contrary, it is an undisguisable fact that, practically, matters of administration are of the very essence of a contract for security upon a railroad. Without this stipulation in the orators' deed, giving the creditors, if the debtors failed, the right of possession to work out their pay, through their own trustees, very likely not a dollar of the loan could have been negotiated. In short, we think that the act of March 28, 1867, if its true meaning was such as these petitioners claim, would be clearly unconstitutional. But the act is reasonably susceptible of another interpretation, and the rule is in such cases to give the law the construction which will be consistent with the constitution. As a matter of construction, we interpret the act as conferring upon the new corporation only such rights of possession as shall not be in conflict with the outstanding rights of others.

(2.) *Is the right of the first trustees to the possession affected by the exchange of a majority of the first bonds for preferred stock?*

A majority of the bondholder interest, as we have seen, have no authority to remove the legitimate trustees; a majority are equally unable to waive any of the rights vested in the trustees by deed. These rights are for the security of the whole debt, not merely a majority of it. Even while they were bondholders, the majority interest could not, so as to affect the minority, waive the right of the trustees to enter upon and manage the property. Still less can they now, since they have ceased to be bondholders, or to be entitled to a vote or voice as such, their bonds

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being paid. This would be so, even if they had been paid in cash. More manifestly is it so, when we consider that they were paid in stock, and thereby they not only ceased to be in interest with the creditors, but actually united their interest with the debtors. They are on no better ground than the defendants to object to the enforcement of the trust according to its terms, so far as possession is concerned. The argument sought to be drawn from the fact that the security is ample is not warranted. The right of the unpaid bondholders to possession through their own trustee is neither strengthened nor weakened by the adequacy of the security. It depends solely upon the continuance of the default of payment.

We see no ground upon which these petitioners can object to a decree, according to the deed, as to possession.

(3.) *As to interest upon converted bonds.*

There is another matter in respect to which the parties who have exchanged first bonds for preferred stock will, perhaps, at a proper time, be entitled to especial protection. They have not prejudiced the other first bondholders. They will probably be entitled to the same relief as the unpaid bondholders, so far as they can have it consistently with their contract with the Rutland Railroad Company, that is, consistently with the terms of their conversion of bonds into stock. It would seem that by their contract in exchanging their bonds, they still retain, under the name of dividends, the right to interest. Whenever any funds shall be in the hands of the first trustees, for payment upon the first bonds, it will be competent for the court of chancery, upon a proper petition and with the proper parties before the court, to make such orders as to the distribution of said funds as will protect any equitable rights the petitioners may prove to have. The case is not so presented as to require, or

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perhaps, even to justify, any order at this time in this respect.

We think no costs should be allowed either party by reason of this petition of Edwards and others, or the proceedings under it.

(4.) *As to the cross bill.*

Upon this subject we need only say that we find no facts proved which give the second trustees any additional rights to possession on account of the transactions relative to the Vermont Valley road. It is only with reference to this matter of possession that we understand the cross bill to be presented. It is not claimed by either party, but that the lease of this connecting road is advantageous and important, and will pass to the first trustees if they take possession of the Rutland & Burlington road; and in that case, independently of the cross bill, the second trustees would be entitled to indemnity from personal liability on account of the lease. We see no occasion for any special relief under the cross bill, and the same is dismissed with costs.

VI. *As to the decree of 1855.*

Entirely independent of the decree of 1855, the orators have now made out a case which entitles them to the same relief meant to be secured by that decree. The case might be disposed of without further reference to that suit; but we think it proper to consider the relation of these parties to that decree, because it possibly might, in one view of the case, somewhat affect the equitable right of the second interest to a delay for the purpose of an accounting before a transfer of possession. It is unnecessary to say whether we should have been governed by that decree as a conclusive adjudication upon all the interests involved, if the decree had been inequitable in its provisions, or had disregarded the just rights of any of the parties. So far from this being the case, it carefully and fairly

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protects all. It was founded upon an agreement ; but by that agreement the second mortgage interest waived none of their rights. Its terms were settled by a long, thorough, and open canvass of the questions involved, in which participated the leading representatives of every interest affected. The agreement was honorable and just to all, and without the least taint of collusion or fraud. It was sanctioned first by the court of chancery, and next by years of recognition and observance by both the first and second mortgage interests.

For years the second mortgage trustees held unmolested possession of the road, publishing to their *cestuis que trust*, to the first mortgage bondholders, and to the world that they were holding it by virtue of the decree of 1855. In recognition of that decree, they made annual statements of their accounts for seven years to the court of chancery ; and these accounts were settled by the court of chancery, upon notice published in designated newspapers in Massachusetts and Vermont. During nearly this entire time, the first mortgage interest were entitled to the possession and control of the road but for the decree of 1855. Under that decree, they were not entitled to it until 1863. While the decree operated to keep the second trustees in possession, they recognized its validity, and thereby induced the first mortgage interest to forbear the institution of proceedings to enforce their right to possession. The second mortgage trustees in their printed report for the year 1856 use the following language : "The court of chancery in Vermont, upon a bill duly filed by the trustees under the first, second, and third deeds of trust and mortgage, for the purpose of settling the respective rights of the different classes of bondholders, the possession of the road and personal property, and the powers and duties of the trustees operating the road.

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ordered and decreed," &c. . . . "The trustees have deemed it their duty to act in strict obedience to that decree." This remarkably accurate statement of the purpose and scope of that decree, and of the recognition of their duty of obedience to it by the second trustees in their printed report, was, of course, seen and understood by the different classes of bondholders, and it was repudiated by none until 1863, when the second interest had no longer anything to gain by the decree. The trustees of the second mortgage in their printed report of 1859 justify their expenditure of a considerable sum of money in the following language: "To keep the rolling stock in constant supply, as by the decree in chancery we are required to do, there have been rebuilt the past year forty-two box and cattle cars," &c. It also appears that the second trustees altered the time of rendering their annual accounts, which they state in their printed report was done to conform to the decree.

In 1856 the second trustees returned their account under oath to the court of chancery, headed as follows:

"To the honorable chancellor of the first judicial circuit of the state of Vermont,—Samuel Henshaw of Brookline, and Thomas Thatcher of Roxbury, both in the commonwealth of Massachusetts, trustees under the second deed of trust and mortgage of the Rutland & Burlington Railroad, operating the same under a decree of this honorable court, made and enrolled on October 3, 1855, in pursuance of said decree come and in court file this their statement and account of the acts and doings in relation to said trust property, and the business done thereon, and of the receipts therefrom, and payments made on account thereof, from May 31, 1855, to August 31, 1856, inclusive, which is as follows," &c.

In 1857 and 1858 accounts headed in precisely the same language were filed in the case. In 1859, 1860,

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1861, and 1862 similar accounts were filed in the case, but without the formal heading. All these accounts were referred and settled by the court of chancery, upon full notice to the various interests affected. Before the March term of 1863, both the second trustees, Henshaw and Thatcher, deceased, and their death was suggested upon the docket in the said case. Up to this time every act of the second mortgage trustees was in open recognition of the validity of said decree, and of the right of the first trustees to possession under it, unless payment was made on or before February 1, 1863. It does not appear in evidence that the second bondholders disapproved of the course of conduct which was pursued by their trustees; nor was it prejudicial to them. On the contrary, it was advantageous; because it preserved to them the unmolested possession of the road from 1855 to 1863. Having stood by and quietly suffered their trustees to induce the first trustees to forbear the prosecution of their rights for years, in reliance upon this decree, they are now equitably estopped from repudiating it. One party having availed themselves of the benefits of the decree, the other is now entitled to insist upon its entire enforcement. If the original institution of the suit and the agreement upon which it was founded were unauthorized, the acts of the parties, who then professed to represent the various interests affected, have been in the fullest manner ratified and approved. The decree having been thus ratified and acted upon, and having been originally entirely just in its terms, it should not be set aside.

In saying this, we do not wish to indicate an opinion that the agreement upon which the decree of 1855 was founded was, even at the outset, invalid, or that it needed subsequent ratification. The trustees of the several classes of bondholders were the legal and duly constituted agents of their *cestuis que trust*, invested

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with ample authority to make such contracts as were necessary for the preservation and protection of their respective trust estates. Whether this was such a contract or not is unimportant definitely to decide.

The fact that these trustees were also interested in the first mortgage loses its significance when it clearly appears, as it does here, that their action was not only in good faith towards the second interest, but also advantageous to that interest, and approved by the great body of that interest both before and after the agreement was made.

In this suit, a decree will be made substantially in conformity to and in execution of the decree of 1855, and in recognition of its validity, but changed in terms so far as the facts now before the court may require.

We will add here, that the orators will recover their taxable costs of this suit, and will recover the same against the defendants who legally represent the second mortgage interest, namely, Birchard and Page.

Whether this and the other expenses on either or both sides, incurred in conducting this litigation, are in whole or in any part chargeable against the trust property, opens a field of inquiry which will more appropriately arise in some other proceeding. We leave all questions on this matter undisposed of.

Nor do we see any occasion in this case to review the action of the court of chancery as to the alleged contempt charged against certain of these defendants.

VII. *As to a delay for an accounting.*

It is urged that in any event the defendants are entitled to retain possession until an account can be taken, and the sum due in equity judicially settled, and even beyond that time until the expiration of a day of redemption, to be hereafter fixed by the court.

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We need not repeat in this connection what was said under the head of the petition of Jacob Edwards and others, as to the effect of the act of March, 1867, and the large exchange under it of first bonds for preferred stock, further than to say, that we hold that they do not affect the rights or remedies of such first bondholders as have not chosen to accept stock for their bonds.

Whether the defendants are entitled to this delay must depend on the decree of 1855, and the deed. We will examine the question first with reference to the decree, and then with reference to the deed.

(1.) By the terms of the decree of 1855, it is expressly provided that the possession of the road should pass to the "first trustees" on February 1, 1863, "unless the obligations secured by said first deed shall be paid and satisfied." It being conceded that the first bonds have not been paid, it follows that the "first trustees" were entitled to possession without delay for an accounting on the said February 1, 1863, and have been ever since. Whatever accounting was necessary on the part of the "second trustees" should have been made annually in the court of chancery. This, as we have seen, was done until 1863. Since then it has been neglected by the "second trustees." It has been suggested, that the provision in the decree that "the trustees under said mortgage deed shall at all times have a lien upon the entire property, both real and personal," to indemnify them from liabilities incurred in the management of their trust, authorizes them to retain possession until their accounts are settled. It is but just to say that this point was not claimed by counsel. It seems to us entirely groundless, because it assumes that a lien can not exist unaccompanied by possession. Still further, we can not be unmindful of the fact that the "second trustees" have repeatedly asked of the court a modification of the

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injunction to enable them to pay large sums of money as dividends. We can not doubt that there are sufficient funds in their hands to indemnify them from personal liability, and they do not state the contrary. The whole decree, taken together, clearly indicates a purpose to pass the road on default to the first mortgagees without delay. An accruing of personal liability in the management of the road, is necessarily continuous while the road is operated. If the interpretation suggested was correct, it would be necessary to discontinue the operation of the road, or the right of possession in the second mortgagees would be perpetual. We think that the defendants are not entitled, under the decree of 1855, to hold possession until an accounting can be had.

(2.) The same result would be reached, independently of the decree of 1855, under the fourth clause of the deed of trust. This deed is a mortgage, and something beyond a mortgage, by virtue of the cumulative remedies secured by the deed of trust. Under it, the grantees might bring a bill for a strict foreclosure. The deed also provides for a sale of the property, upon certain terms and conditions, and finally it provides that the orators may pursue their security by entering upon, managing, and controlling the road, until paid from its earnings or otherwise. This last remedy is secured by the fourth clause, and is the remedy which the orators are at present seeking to enforce in this case. These several remedies are cumulative and not alternative. A decree enforcing the fourth clause will not prejudice the right of the orators to relief under either of the other modes of remedy secured by the deed, if such relief shall subsequently prove necessary for the effectual protection of their interest. Indeed, the orators might have pursued their remedies under the fourth clause and by foreclosure, simultaneously; but in this case the orators

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express their present satisfaction with the special relief secured them by the decree of 1855 under said fourth trust. If this was the only remedy provided, the deed would resemble what is denominated a "Welsh mortgage," or *vivum vadium*. 4 *Kent*, 137; *Redfield on Railways*, 493. "Under such a deed," says Judge REDFIELD, "the more appropriate course will be the appointment of a receiver, or transferring the road into the power and control of the trustees, for the benefit of the bondholders, subject to accountability before the courts of equity." A deed containing precisely such provisions as this was held in Massachusetts not to be limited to the specific remedies provided for in the deed, but to give beyond them the right to a strict foreclosure. The bill in that case prayed for a specific decree of foreclosure, as well as for general relief. Upon the facts, the court say: "We can see no reason why the plaintiff ought not to be put in immediate possession of the mortgaged property, in order that the purpose for which the conveyance was made may be accomplished, and the trust created by it properly executed. The defendants have neglected and still neglect to pay the interest which has accrued upon a large proportion of the bonds, which were duly issued and are held by the creditors of the corporation. These bondholders are entitled to demand the money which has become due, and it is the duty of the trustees to make use of the discretionary power which was conferred upon them, for the express purpose of insuring the payments to which the creditors should severally become entitled. To that end possession of the mortgaged property is indispensable." The court add in that case: "A decree must, therefore, be entered in behalf of the plaintiffs, entitling them to have immediate possession of all the mortgaged property." *Shaw v. Norfolk R. R. Co.*, 5 *Gray (Mass.)* 170.

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The same facts exist in the case before us which induced the court, in the case we have cited, to grant a decree for immediate possession. Even in the case of a strict foreclosure, the court should not grant a delay for the purpose of taking an account, unless a delay is necessary. But there is by no means the same occasion or equitable reason for delay in this proceeding which exists in a proceeding for a strict foreclosure. There, the absolute title of the property passes to the orator; while by the remedy here sought, under the fourth clause, nothing whatever is foreclosed. Instead of a day of redemption limited by the court, the defendants will retain a right unlimited in time to pay the debt and have back their estate. The general title will remain all the while in the defendants. The orators will hold only a temporary use, and that only to satisfy a debt which is outstanding against the property. Even that use they will hold upon a trust for the defendants, to return them the estate the moment the debt is extinguished. Intended, as this process is, simply to enforce a trust according to its agreed terms, which terms are thus tender of the debtor, and by which the orators can never acquire the title of the property, and can compel payment of their debt against it only by its judicious use, it has hardly a point of analogy to a strict foreclosure beyond the mere circumstance of its involving a security. It suggests a strict foreclosure rather by antithesis than by analogy. To delay the relief here prayed for, as if it was a bill to foreclose, until after an accounting and the expiration of a day of redemption, would be utterly inconsistent with the remedy sought and stipulated, and would be a denial of the just rights of the orator, such as could find no apology in reason, and, so far as we are informed, no shelter in precedent. If it appeared that, since the first default, there had been large payments, so as to

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leave it doubtful whether the defendants still remained in arrear, there would be more ground for taking an account before ordering a transfer of possession. But here there have been no payments other than some interest upon the unconverted bonds, and the continuance of the default is unquestionable. There is, therefore, absolutely nothing to defeat the perfected right of the "first trustees" to possession according to the terms of their deed, and to hold it until the loan is paid. And as all questions upon the validity of the bonds, and as to interest and currency, are settled at this hearing, it is quite possible that there remains no serious ground for *bona fide* litigation in respect to them. None is specified, although it is stated in general terms, that an accounting is necessary. If so, it may and should be had after the transfer of possession. It is not necessary or proper in such a case that the mortgagors should bring a separate bill to redeem. The accounting should be taken in this case, if necessary to be taken at all, and the orators will be bound to return the property when their debt is paid from any source. They will hold the property subject to the direction and control of the court of chancery, to account in that court for its earnings.

Again, it is to be noticed that the defendants have not offered to redeem in their answers. They have not even asked to redeem in the alternative of a failure of their main defense. Had they done so, the accounting so far as needed might and doubtless would have been taken and passed to this court with the rest of the case. At least, the defendants should have given an opportunity for it, by asking in their answers to redeem in this proceeding. Not having done this, their right to redeem without an independent suit is not lost, but their claim for a delay of the transfer of possession for the purpose of taking an account with

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reference to redeeming stands on more clearly inequitable ground than it otherwise would.

To hold the fourth clause nugatory because, even without it, the mortgagees would, at law, be entitled to possession after condition broken, would be in palpable violation of the plainly expressed intention of the deed of trust. That this provision of the trust was not intended as a mere statement of the right at law of the orators, as mortgagees, to enter upon the property after condition broken is apparent, from the fact that the right is to be exercised only after a demand in writing, and a failure to surrender the possession for the period of four months after such demand and default. It can not be denied that it was competent for the parties to make a special trust agreement of this kind with reference to the possession of the property. It being competent for the parties to make it, and they having done so in plain and unmistakable terms, the court have no authority to annul it, or to refuse to enforce it according to its spirit and meaning.

(3.) It is very true, however, that the only legitimate object of this suit is to collect a debt, and a transfer of the possession will be ordered solely as a means to this end appointed by the deed of the parties. It appears that the mortgaged property is ample security for the first mortgage debt. It also appears that the Rutland Railroad Company are authorized to sell preferred stock to obtain funds to pay their bonds. It would seem that, without much doubt, now that all matters of serious controversy are determined, such steps may and probably will be immediately taken as will result in the payment of the outstanding first mortgage bonds without any substantial delay. In view of these facts and of the practical importance to both parties of facilitating such a result, and in view of the fact that a transfer of so large a property upon the eve of payment would involve considerable unnec-

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essary expense and might tend to retard, instead of hastening payment, we feel justified in suggesting to the chancellor to hold the case until June 1 next, before issuing his decree under the mandate of this court for a transfer of possession, and if at that time, upon summary examination, it shall be made clearly to appear to the chancellor that the defendants have paid the outstanding bonds, so far as accessible, to delay the order for a transfer of possession for the time being, to enable the defendants to discover the remaining bonds and make complete payment. This margin, as to the mode and time of perfecting the cause under the mandate of this court, we think it just to the parties to leave to the chancellor with the suggestion we have made. Subject only to this qualification, it is ordered that a decree pass for the orators, in accordance with the views stated in this opinion, with costs, and that the possession of the property be transferred to the first trustees, to be held and administered in accordance with the fourth trust of the first deed of trust and mortgage.

PECK and WILSON, JJ., concurred.

BARRETT, J., dissented.

PIERPONT, Ch. J., and PROUT, J., did not sit.

MANDATE FOR DECREE.—In this cause the *pro forma* decree of the court of chancery is reversed and the cause remanded, and it is ordered that a decree pass for the orators to the following effect:

That the first deed of trust and mortgage is valid.

That the said Cheever and Hart are the legal and equitable trustees under said deed, vested with like powers and charged with like duties as the original trustees Hooper and Haven.

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That the bonds secured by said deed may be paid in any lawful money of the United States.

That the holders of said bonds are entitled to interest thereon at the contract rate until paid, that is, at seven per cent. per annum, payable semi-annually, and all sums which have or may become semi-annually due, as interest, whether the same be expressed in coupons or not, shall draw interest at six per cent. from the time when due until paid.

That the said decree of 1855 is valid, and should, in its substantial parts, be executed by the decree in this cause; that the second mortgage trustees are entitled to have and may have such personal indemnity and such security and lien upon the trust property, when in the hands of the trustees under the first deed of trust and mortgage, as are provided by said decree; and that said second trustees, as soon as may be, render, in this cause, their account of their administration of their trust for the period since the last accounting which was rendered and settled by the court of chancery under the decree of 1855.

That the said provisions as to liens, security, and accounting shall not operate to delay or prevent an immediate transfer of the possession and control of the trust property from the trustees under the second deed to the trustees under the first deed.

That both by reason of the default under the first deed, and also by virtue of the decree of 1855, the orators are now entitled to such a transfer, and accordingly it is ordered that the second mortgage trustees be required to immediately surrender the entire trust property, including the road and all its property, real and personal, to the said trustees under the first deed, except the cash on hand, which the second trustees may retain in their hands, for their security, until their account shall be settled, they holding the same,

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as hitherto, under the order and injunction of the court of chancery as to its disposition.

That after such transfer the said first mortgage trustees shall hold and administer the trust property according to the fourth trust in the first deed of trust and mortgage and under the control and direction of the court of chancery, and as in the decree of 1855 is provided—and from the net earnings and funds of said trust property shall make such payments upon the interest and principal of the first bonds as required by said trust, but only under the order and direction of the court of chancery—and this relief is without prejudice to the right of the orators to the other remedies to which they may be entitled under their deed, provided others shall prove necessary to protect their interest.

It is further suggested to the court of chancery, that this cause be held as “with the chancellor” until the first day of June, 1870, before issuing any order for the transfer of the possession of the trust property, and if at that time, upon summary examination, it shall be made clearly to appear to the chancellor, that the defendants have paid the outstanding unconverted first mortgage bonds so far as accessible, then in that case to further delay the order for a transfer of possession for the time being, to enable the defendants to discover the remaining unconverted bonds and make complete payment, and obviate the need of such transfer. It is further ordered that the cross bill be dismissed with costs; that no costs be allowed either party by reason of the petition of Jacob Edwards and others; that the taxable costs of the orators in this suit be recovered against the defendants, Birchard and Page, and that the bill stand dismissed as to the defendant Fay, without costs and without prejudice.

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25 *Michigan*, 214.*Supreme Court of Michigan ; July Term, 1872.*

Incorporation. Lands. Although the legal existence, by force of obligatory law, of a railway corporation is confined to the state which has created it and endowed it with its powers, capacities, and rights, and it can only exercise those powers, capacities, and rights in another state by permission of the authorities of such state, the mere right to purchase and sell property, not being in its nature a franchise, but a right existing also in individuals without special grant, will generally be recognized and protected in other states than that by which the corporation was created.

This principle is applicable to the power of a railway corporation to take, hold, and convey lands, that being among the powers or capacities incident to a corporation at common law, without special mention in its charter. Hence, where a corporation is created in one state, with powers, so far as that state can give them, of taking, holding, and conveying lands in another state where the legislature have not expressly or by implication forbidden it, an affirmative enabling act is not necessary to give them the capacity to take, hold, and convey lands in the latter state; this capacity rests upon the same principles of comity as their capacity to make or enforce contracts, or to acquire, hold, and convey personal property.

In a case involving the validity of a deed of lands in one state to a corporation created by the laws of another state, in the absence of any showing what the consideration for the deed was, if any species of consideration,—such as the payment of a debt to the corporation,—will support the deed, it will be presumed that it was made for that consideration; courts will not presume illegality.

The courts of one state will recognize the right of corporations of another state to realize and collect the debts due to them, by receiving a conveyance of lands in the former state, unless the constitution or the legislature have, either expressly or by clear implication, declared a contrary rule. Such a right is not in any way

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dangerous to the citizens or inconsistent with the public policy of any state. Nor is there any distinction between the rights of railroad corporations in that regard and those of other corporations.

Error from the supreme court of Michigan to the circuit court for St. Joseph county.

This was an action of ejectment by J. Edgar Thompson against Ira Waters. The facts, and the grounds upon which the parties respectively claimed title to the land involved are stated in the opinion. Judgment was rendered, in the circuit court, for the defendant, to review which the plaintiff brought this writ of error. In view of the importance of the questions involved, the supreme court, of its own motion, ordered a re-argument.

H. H. Riley, and *R. Brackenridge*, for the plaintiff in error.

Shipman & Loveridge, for the defendant in error.

CHRISTIANCY, Ch. J.—This was an action of ejectment brought by the plaintiff in error against the defendant in error in the circuit court for the county of St. Joseph, to recover the north half of the south half of section 24, township 7 south, of range 11 west, situated in said county of St. Joseph.

Both parties claimed through J. Eastman Johnson, who owned the land previous to the deeds stated below.

The plaintiff's claim of title was this: On July 20, 1853, Johnson, by warranty deed, conveyed the land to the Fort Wayne & Chicago Railroad Company, a company incorporated under the laws of Indiana. By several acts passed by the legislatures of the states of Pennsylvania, Ohio, Indiana, and Illinois, authorizing the consolidation of railroad companies, and by the

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articles of consolidation of May 6, 1856, consolidating the Ohio & Pennsylvania Railroad Company, the Ohio & Indiana Railroad Company, and this Fort Wayne & Chicago Railroad Company, under the name of "The Pittsburgh, Fort Wayne, & Chicago Railroad Company," all the powers, rights, and franchises of said several companies so consolidated, passed to and became vested in the said Pittsburgh, Fort Wayne, & Chicago Railroad Company. This consolidated company, on December 1, 1856, executed to Hugh McCullough, as trustee, a mortgage upon this and other lands and property. And the said Pittsburgh, Fort Wayne, & Chicago Railroad Company, and McCullough, the mortgagee, by their several deeds, dated respectively October 17, and October 24, 1860, conveyed the land in question to the plaintiff. All the foregoing were duly recorded in the office of the register of deeds for St. Joseph county, prior to the execution of the deed from Johnson to Merrick, mentioned below.

The defendant claimed title under the following conveyances :

First. A quit claim deed from J. Eastman Johnson to Benajah G. Merrick, dated November 29, 1860 ; and

Second. A quit claim deed from Merrick to defendant, dated November 30, 1866 ; both of which deeds are duly recorded. The lands lie at least fifty miles from any part of the railroad in question.

The court charged the jury, at the request of the defendant, " that the Fort Wayne & Chicago Railroad Company, at the time of the execution of the conveyance from Johnson to it, had no power to purchase and hold the lands in question in this state," and " that the jury will find for the defendant."

This raises the only question in the case which needs to be noticed. Was the Fort Wayne & Chicago

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Railroad Company, being a corporation created by and existing under the laws of the state of Indiana, competent to take the title to this land in this state, under the deed executed to it by Johnson?

This question depends, first, upon the laws of Indiana; and, second, upon the laws of this state, and the public policy indicated by its legislation.

1. As it was an artificial being, created only by the laws of Indiana, and by them alone endowed with whatever powers and capacities it possesses, it could have no capacities nor exercise any powers anywhere, which were not, expressly or by implication, given by those laws; or, in other words, no powers or capacities which would not be recognized and sustained by the courts of that state, had the same question of capacity to take these lands come before them for adjudication.

The Fort Wayne & Chicago Railroad Company, to whom this land was conveyed, was organized under the general railroad law of that state, entitled "An act to provide for the incorporation of railroad companies," approved May 11, 1852. Most of the provisions of this act, in reference to the powers of companies to take lands, confine the power to such as the necessities of the company require, in exercising its franchises of building and maintaining the road.

The second subdivision, however, of section 13, gives power to "receive, hold, and take such voluntary grants and donations of real estate and personal property as shall be made to it, to aid in the construction, maintenance, and accommodation of such railroad; but the real estate thus received, by voluntary grants, shall be held and used for the purpose of such grants only. It might admit of a question whether, under this provision, there was not power to acquire lands to be converted into money for the use of the company; but the question is quite immaterial, since the act of

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the legislature of the state of Indiana, of January 20, 1852,—which, if it did not take effect at an earlier date, took effect at least with the Revised Statutes of that state, of which it is a part (ch. 184), on May 6, 1853 (Jones v. Cavins, 4 *Ind.* 305; Ledley v. State, *Id.* 580; State v. Kiger, *Id.* 621),—gives power (§ 2) to any railroad company which, then or thereafter, might be incorporated, by the consent of the directors of the same, “to receive the subscription for the capital stock of said companies, under such regulations and restrictions as their boards of directors may prescribe, any lands, town lots, real estate, or other description of property, as may be offered for that purpose: *Provided, however,* That the same shall be sold, except so much as may be necessary for the use of said road, or for the purposes aforesaid” [referring to certain provisions in section 1, in reference to lands taken on subscription of stock, or purchase for depots, turnouts, workshops, warehouses, &c.,] “within a reasonable time, and the proceeds applied for the construction of said roads, or their appurtenances.” That under this act the courts of Indiana would hold that these lands, though out of the state, might have been received for stock of the company, is sufficiently apparent from the decision in Cincinnati, &c. R. R. Co. v. Pearce, 28 *Ind.* 502, in which it was held that lands situated in the state of Ohio, conveyed to an Indiana corporation, under authority of this act, constituted a valid consideration for a contract on the part of the company to issue stock for the amount.

And I see no reason to doubt that the courts of that state would recognize the right of the company to take lands in another state, in payment of a debt due the company, accruing in the legitimate prosecution of its business, and which would, therefore, be represented by the stock of the company. Indeed, independent of this act of January 20, 1852, I see no

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reason why the courts of that state should not recognize the right of the company to take such lands in payment of a debt so accruing, though they might not allow them to take the funds of the company to invest in another state. The main objection to allowing corporations, in the state of their creation, to hold lands not occupied and used in or necessary to the exercise of their franchises, is based upon the idea that it might be prejudicial to the public interest of that state, to allow corporations to become speculators in lands, or to hold them in large amounts, keeping them out of market for an unreasonable time, and preventing improvement, &c.; but this objection could not well be urged in the state of their creation, against their holding lands in other states, taken in payments of debts justly due them, accruing in the course of their legitimate business. The state in which the land lies might, if it chose, object; but the state of their creation could not be interested in raising such objection; but so far as it was interested at all, it would seem to be in favor of sustaining the right; for, unless the creation and prosperous continuance of such corporations were supposed to be objects of public interest, which deserved to be fostered, it is not likely the state would have authorized their creation. The courts and public authorities of such state may, therefore, be presumed to look with favor upon such facilities afforded to their corporations for collecting the debts due them in other states. And if the case were reversed, and one of our corporations should take lands in the state of Indiana, in payment of a debt due them there, we should, without hesitation, say, "If Indiana makes no objection to this, we do not see how any public interest of Michigan, or its people, can be promoted by our refusing to allow the corporation to avail itself of the facility thus afforded for the collection of its debts."

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We may, therefore, safely assume that the courts of Indiana would not refuse to recognize the right of this company to take lands in this state, in payment or security for debts due to it here.

But these considerations only go to show that the laws of Indiana present no obstacle to the taking or holding of these lands by the company; in other words, they show that, by the laws of Indiana, so far as the question depends upon them, this company was competent to take this land in this state.

But the laws of Indiana have no force or operation (as laws, giving powers, or creating or enforcing obligations) within the state of Michigan. No state has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises, in other states. It may confer powers, in the nature of a commission, to be exercised anywhere, upon condition that their exercise be assented to by the state or sovereignty where their exercise is sought; but without this assent, express or implied, such powers would be nugatory outside of the state granting them. Each state, by its own legislature, must determine for itself all such questions of public policy arising within its limits.

But, upon the principle of comity, which is a part of the voluntary law of nations, recognized, to a greater or less extent, by all civilized governments, effect is frequently given in one state or country to the laws of another, in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with or depending upon such foreign laws, without which commercial and business intercourse between the people of different states and countries could scarcely exist.

And, among the states composing the federal union, —whose relations and intercourse are much more inti-

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mate than those of foreign states (properly so called), and the interests of whose citizens are so intermingled that, in commercial and business enterprises, state lines are scarcely more regarded by the people than county and township lines,—it is the common interest of all to encourage the recognition of those principles of state comity which tend to make us, in feeling and in interest, one homogeneous people, without limiting the independence of any states, and reserving to the people of each the sole right of regulating their own internal affairs, and of determining, at any time, through their legislation, what limits to the recognition of the laws of other states, public policy, or the welfare of the people may require to be imposed. Such has been the general course and tendency of the judicial decisions in the several states.

Upon scarcely any subject has this comity been more generally admitted and administered than in reference to corporate rights and interests.

The rights which they have generally been allowed to enjoy, and the powers they have been allowed to exercise, in states other than that of their creation or domicile, have varied considerably, according to the nature and objects of the different corporations, and the corresponding differences in the mode of doing their corporate business. An insurance company in doing its business in another state, owing to the nature of the business itself (making contracts of insurance), would seem to be exercising through agents, its corporate franchises, in the same way as in the state of its creation, with the exception of corporation meetings and the strictly official action of its officers; and for this, as well as the prudential reason of protecting their citizens from imposition, and, perhaps, encouraging home companies, other states have quite generally required their compliance with certain rules and regulations fixed by the legislature, as conditions, upon

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which alone they are allowed to do their business within such state. Such has been the case in reference to insurance companies in our own state; and somewhat similar regulations have sometimes been adopted in some states, with reference to a few other corporations. But there are many other corporations whose business is, in its nature, more of a local character, confined mainly within the state of its creation, and only incidentally making contracts or acquiring property in other states, in the course of carrying on their home business, and in such cases the legislatures of the latter have seldom interfered, or placed them under any restriction. And the rule seems to be generally and well settled that the corporate existence, rights of making and enforcing contracts, of acquiring property, and transacting business (not requiring the exercise of official corporate action or franchises within the state), of a corporation created by the laws of one state, will be recognized and protected in another; subject only to the qualification, that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the state in which they are sought to be enjoyed or exercised, or prejudicial to the interests of such state or its citizens. With these limitations the rights above mentioned, of a corporation created in one state, are as clearly recognized and as generally enforced in another, as the individual rights of an inhabitant of one state are recognized and enforced in another, of which he is a non-resident; though such corporations can not, of course, claim in another state such recognition of corporate existence or rights, as a citizen of the state of its domicile, under the clause of the constitution which secures to the citizens of each state "all the privileges and immunities of citizens in the several states," as this would impair the independence of the several states, by depriving them of the right to regulate their own

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internal affairs, according to their own interests, and ideas of state policy.

A corporation, however, in any aspect in which it is here essential to consider it, is but an artificial person, whose strictly legal existence, by force of obligatory law, is confined to the state which has created it and endowed it with its powers, capacities, and rights; and it can only exercise those powers, capacities, and rights, in another state, by the permission, express or implied, of the sovereign or legislative power of the latter, which must be its own judge how far, and upon what conditions, it is consistent with its own domestic policy, and the interests of its citizens, to accord such recognition. The mere right of a corporation to purchase and sell property, not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in states other than those of its creation.

And, as well observed by Judge STORY, in reference to questions of this kind (*Conflict of Laws*, §§ 35 and 37), fully approved by the supreme court of the United States, in *Bank of Augusta v. Earle*, 13 *Pet.* 589: "In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation," [or state] "which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided." See, also, *Runyan v. Coster*, 14 *Pet.* 122; *Bard v. Poole*, 12 *N. Y.* 495; and *Merrick v. Van Santvoord*, 34 *Id.* 208.

As it is not, then, the comity of the courts, but that of the state, and the question is upon the adoption or qualified adoption in this state, of the laws, or rather

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certain incidents growing out of the laws, of Indiana, it follows that the power of determining the question whether, and how far, or with what modification, or upon what conditions, the laws of that state, or any rights dependent upon them, shall be recognized here, belongs to the legislative or law-making power of this state, and that the judiciary, whose province is only to declare and not to make the law, must be guided in their decisions by the principle and policy adopted by the legislature of this state in reference to this question. And, in ascertaining what this legislative policy is, we are to be guided not only by such express provisions as they have chosen to make, and the natural implication from them, but also by their silence, which may furnish as clear an indication of what that policy was intended to be, as can be drawn from what they have expressed; since, if they have made no provision at all upon the particular subject, or branch of the subject, or question involved, it may reasonably be inferred that they intended to adopt, and left the courts to apply, the generally received principles of comity, and, to that extent, to adopt the foreign law, or rather to recognize the rights dependent upon such laws; and if they have chosen to leave the matter without any legislative provision, the case must be a very clear one indeed, which would authorize the courts to refuse such recognition, on the ground that it would be prejudicial to the interests of the state; since the legislature are the proper representatives of the public interest, and having the exclusive power to determine what shall be the public policy of the state, if they have chosen to make no enactment upon the subject, it is natural to infer they omitted to do so because they thought it unnecessary, and that the generally recognized principles would be sufficient for such cases. None of the foregoing principles have been seriously questioned in this case, so far as they

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relate to the power and capacity of corporations, created in one state, to make and enforce contracts and to acquire personal property in another.

But it is insisted that the question of the power or capacity to take the title to real estate, to hold and dispose of it, stands upon a different ground from that of acquiring personal property. There are undoubtedly some differences between personal and real property, in respect to the laws by which they are to be governed; but whether they affect the present case, remains to be seen. Thus, personal property generally follows the person of the owner, or, in other words, the right to and the mode of acquiring and disposing of personal property, are generally to be governed by the law of the domicile of the owner, while real estate, in everything which pertains to the mode and validity of conveyance and transfer, depends upon the law of the place in which it is situated. But it would be entirely competent for each distinct sovereignty to adopt, in this respect, the same rule as to both kinds of property within its limits, if it thought fit to do so; and it is by comity only, that personal property, in one state or country, is allowed to be governed by the laws of another. As to the mode of acquiring and transferring and transmitting real estate, that comity has not been carried so far as to allow the foreign law to govern the mode or form of conveyance. And in most countries formerly, and in many even now, it has been the custom to establish their own peculiar rules governing the capacity of parties to take, or the parties capable of taking and transferring, real estate. while this has not been usual with reference to the capacity to take, hold, or transmit personal property. Thus, in England, and formerly in many of the United States, though aliens might take, they could not hold land, if claimed by the king or the state, and could not transmit or convey it. But it is quite competent

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for any sovereignty or state to abolish this distinction, and to make the capacity the same in both cases, without any restriction upon either. This is precisely what has been done in this state, and in most of the other states of the Union. Our statute (*Mich. Rev. Stat. of 1846*, ch. 66, § 35) places aliens, whether residents of the state or not, upon the same footing in all respects, as native citizens of the state, or of the United States, in reference to the right to acquire, hold, convey, and transmit lands. And the constitution prohibits the legislature from establishing any less liberal rule, as to such aliens as are or may be residents of the state. *Art. XVIII.*, § 13. All persons alike, therefore, without reference to nationality, race, color, sex, or age, who in this state are competent to take, hold, convey, or transmit personal property, can do the same with real estate. The rule is general as to both, and legislative action would be required to create an exception as to either. In fact, lands, in all the western states at least, have become about as much articles of trade and commerce, as goods or other personal property, and it has been the policy of most of them to encourage this traffic, and to facilitate the acquisition and transfer of real estate.

Among the powers or capacities incident to a corporation at common law, without any special mention in their charter, was that of taking, holding, and conveying lands; and these incidents still remain even in this country, where charters are granted only by the legislature; subject only to such restrictions as the legislature has seen fit to impose, by express provision or tacit implication. The act of incorporation, in effect, gives to the corporation substantially the powers and faculties of a natural person, except as they are in some way restrained by the act of incorporation, or some other law of the state creating it.

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When, therefore, a corporation is created in the state of Indiana, with powers, so far as that state can give them, of taking, holding, and conveying lands in this state, I do not see upon what principle it can be held that an affirmative enabling act in this state is necessary to give them the capacity to take, hold, and convey such lands here, unless our legislature have, expressly or by implication, forbidden it. The question of capacity seems to me to rest upon the principles of comity, as much as their capacity to make or enforce contracts, or to acquire, hold, or convey personal property. I say the question seems to me to rest upon the same principles, but by this I do not mean that there may not be stronger reasons against recognizing that capacity as to land, than as to personal property; but these are all reasons of public policy which bear upon the question of comity, and, therefore, more appropriate for the legislature than the courts. Thus the main, if not the only, evils to be apprehended from allowing corporations, domestic or foreign, to take, hold, or convey lands are: 1.. The danger of their becoming speculators in lands to large amounts, keeping them unimproved and thereby retarding the progress of settlement and improvement, or, if improved, preventing settlers from obtaining clear or independent titles, and introducing a system of tenancies in which the tenants would be, in a great measure, dependent upon such corporations; 2. The holding of such lands for a long period of time, as they pass by perpetual succession without any change or break by death, as in the case of natural persons; and, 3. The influence which wealthy corporations, holding large bodies of land in the state, might exercise upon the legislature. These considerations apply with no peculiar force to railroad corporations as such, but equally to banking, manufacturing, insurance, or other corporations; and they are all very proper con-

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siderations for a constitutional convention, in framing the fundamental law, and for the people in adopting it, as well as for the legislature, who, in all matters not fixed by the constitution, are properly vested with the power of determining the public policy. And in a case where it should very clearly appear to the court from the amount of the lands purchased, or the purpose for which they were purchased, or other circumstances, that the dangers I have mentioned were seriously to be apprehended, it may be (though the present case does not call for an opinion upon this point), that the court would be authorized, without any legislative prohibition to that end, to refuse to recognize the law of the state creating the corporation, or so much of it as had undertaken to confer the right of holding such lands; and, consequently, to treat the conveyance as void for want of such capacity. But when, from the nature of the case, no such danger can be reasonably apprehended, I see no very intelligible ground upon which the court could thus treat the conveyance as void, unless the legislative department, in some way, have clearly indicated a policy which requires it.

In accordance with the principles already explained, it was held in *State v. Boston, &c. R. R. Co.*, 25 *Vt.* 433 (Judge REDFIELD giving the opinion), that a railroad company, chartered in the state of New Hampshire, had the right and the capacity to purchase lands in the state of Vermont, without any act of the latter state affirmatively authorizing it; though the land was not taken in payment of or security for a debt due the company, but for the purpose of being used in connection with their road, if it should ever be connected with a road authorized in the latter state. And it may, or may not, also legitimately result from the principles I have already expressed, that in the case now before us, the Fort Wayne & Chicago Rail

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road Company had the capacity to take this land by the conveyance from Johnson, and to hold and convey the same, though the conveyance were shown to have been made to the company in consideration and in payment of Johnson's subscription to the stock of the company; inasmuch as the statute of Indiana, which gave the authority to receive the land for stock, also required the lands thus received to be sold within a reasonable time, and the proceeds applied for the construction of their road and its appurtenances; and it must naturally be supposed to have been for the interest of the company to make an early sale, without which the stock subscribed and for which the land was received, could not be rendered available; and the courts of Indiana have by judicial decision fixed the "reasonable time" within which a sale of such lands should be made, at ten years (15 *Ind.* 459), in exact accordance with the provision of our constitution (which took effect January 1, 1851), which provides that, "No corporation shall hold any real estate hereafter acquired, for a longer period than ten years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises,"—a provision which goes upon the assumption or admission that real estate, though not actually occupied by a corporation in the exercise of its franchises, may hereafter be acquired, and applies to no other.

But I express no opinion in this case, upon the question, what would be the effect of the conveyance by Johnson to the company, if made in consideration of or in payment for stock. This question is not involved in the case. The record does not show that such was the consideration of that conveyance, nor, in fact, what the consideration was, except that the deed expresses upon its face the consideration of sixteen hundred dollars. But this is equally consistent with the fact, that the conveyance was made in pay-

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ment of a debt, due from Johnson to the company, as that it was paid in any other way. Now, as it does not appear from the record that the conveyance was made in payment for stock, nor what was the actual consideration for or purpose of the conveyance, and we are not allowed to presume illegality, but must presume the transaction to have been legal till the contrary is shown; if the deed would have been void for want of capacity to take, if given for one species of consideration, or for one purpose, but the company had capacity to take, and the deed would be valid, if made for any other consideration or purpose, we are bound to presume that it was made for the consideration and for the purpose, for which the company had the right and capacity to take it; and consequently the conveyance must be held valid, if it was legally possible for the company to take the title, for any purpose or upon any consideration whatever. *Regents of the University v. Detroit Young Men's Society*, 12 *Mich.* 138.

If, therefore, this company had the power or capacity to take this land, in satisfaction of a debt due it from Johnson, accruing in the legitimate prosecution of its business, the conveyance must be held valid, and the company must be held to have had the capacity to take the title and the power to convey it.

Now, whatever danger might be apprehended from allowing corporations of other states to take lands for stock, or for purposes of speculation, I can not conceive that the privilege of taking lands, in good faith, in payment of debts, and which must, therefore, be merely occasional, and with the intention and for the purpose of converting them into money for the realization of the proceeds, can be so dangerous to the public interest of this state or its citizens, as to authorize the courts to declare such conveyance void, on that ground; especially as the property could only be held for ten

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years, under the constitutional provision already cited. And I think it may be laid down as a safe and sound principle that, unless the constitution of the state, or its legislature, have, either expressly or by clear implication, declared a contrary rule, the courts of any state are bound to recognize this right of the corporations of other states, thus to realize and collect the debts due to them; and such seems to have been the course of decisions in the several states where this question has arisen. See *Silver Lake Bank v. North*, 4 *Johns. (N. Y.) Ch.* 370; *Lumbard v. Aldrich*, 8 *N. H.* 31; *New York Dry Dock v. Hicks*, 5 *McLean*, 111; *Lathrop v. Commercial Bank*, 8 *Dana*, 114. Though in the first and the last of the cases above cited, the question arose upon a mortgage to such corporation, yet, in Kentucky certainly, a mortgage conveys the legal title; and, therefore, the question is the same as here; and I think the same may be said of the law of New York, when the mortgage was executed, which came in question in the case first above cited. In the other cases the question arises directly upon the power to take the title.

Most of these decisions expressly, and the others tacitly, go upon the ground that, inasmuch as corporations have the right to make contracts in states other than that of their creation, and to enforce them in the courts of such states (a right not disputed in the present case), in the same manner as an individual of another state is allowed to contract and to sue, they must, in the absence of any legislation to the contrary, be allowed to enforce their judgments in the same way, and have the right to avail themselves of all the same means and facilities for that purpose; and, consequently, that where the individual has the right to obtain the title to lands under execution, the same right must be accorded to such corporations; and that, having the right thus to acquire the title by the com-

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pulsory means of an execution, the debtor may, by voluntary agreement, do what, without his consent, the law would compel; and that he may, therefore, convey, by his own deed, the title which, if he had not thus conveyed, the law would, by its process, have conveyed in spite of him. It is true, as to the case cited from New Hampshire (*Lumbard v. Aldrich, ubi supra*), the law of that state did not (at that time, at least) permit a sale of land, upon execution to the highest bidder, but the proceeding was by appraisal, and setting off to the creditor,—in other words, by extent,—by which none but the creditor could take the title (see *Morse v. Child*, 7 N. H. 583); and in this case the reasoning above adverted to, was, therefore, absolutely conclusive, if the right to sue in the courts of New Hampshire were admitted or shown. But in the other cases cited, the land might be sold on execution or decree, to the highest bidder, as in this state; and yet the same course of reasoning was held to apply; and I think properly so held; for, though the law in this state, for instance, requires a sale of land upon execution, at which any person, as well as the creditor, can bid; yet, in a question of the kind now before us, we ought to take a practical, rather than a mere theoretical, view of the question; and we know, as matter of fact, that, while the law requires a sale to the highest bidder, there is not one case in fifty, of a sale upon execution, subject as it is to redemption, in which a sale can be made for any reasonable price, if at all, except to the creditor; and, consequently, the creditor is almost always compelled to bid off the land, or lose his debt, or most of it; and it is, or should be, the policy of the law to have the property sell for its real value, or as near it as may be, which can seldom happen, except when sold to the creditor himself.

This power of foreign corporations to take lands in payment of debts, has not, so far as I have been able

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to find, been anywhere treated as one which is in any way dangerous to the citizens, or inconsistent with the public policy of any state; and I have been unable to find a single decided case, in which the question was directly involved, where the power has been denied; and I am not willing to take the lead in establishing a contrary doctrine—a doctrine which, in its injustice, narrowness, and illiberality, if not inhospitality, may have much to commend it to Chinese exclusiveness, but nothing in harmony with the liberal spirit of American commercial intercourse.

But we have ourselves, in this court, already held that a foreign banking corporation may take the title to lands in this state, in payment of debts, and impliedly that such corporation may sell such land. See *Ives v. Bank of Lansingburgh*, 12 *Mich.* 361, a case which arose since our present constitution. And we have in several instances recognized the right of such foreign corporations, as *cestuis que trust*, when the legal title was vested in a trustee. See *Trask v. Green*, 9 *Mich.* 358; *Taylor v. Boardman*, 24 *Id.* 287; and, so far as affects any question of state policy, or danger to be apprehended from foreign corporations owning lands in this state, or any question of comity, I can see no difference between the recognition of such equitable interest, and the legal estate; since the corporation would ordinarily, in both cases alike, control the land. And, in every case of a naked trust, the statute itself executes the trust and places the legal estate in the *cestui que trust*. *Mich. Rev. Stat.* 1846, ch. 63, § 3.

Now, as already remarked, there is nothing peculiar to railroad corporations, so far as any question of comity, or danger, or prejudice to the interests of the people, or the public interests, is involved. But all the same objections of this nature would apply as well and as strongly in the case of a foreign banking, as a

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foreign railroad, corporation; so that I think the question in the present case may be looked upon as decided in favor of the right of this company to take this land in payment of a debt, unless we shall find some legislative prohibition.

It remains, therefore, only to see whether such prohibition is to be found in our statutes. The only provisions to be found in our statutes expressly in reference to foreign corporations, which can be claimed to have any bearing upon the question, are the following, which I think do not tend to negative the rule which I have endeavored to show is the rule of comity: Section 1 of chapter 116 of the Revised Statutes of 1846 (*Mich. Comp. Laws*, 1857, § 4833) provides: "A foreign corporation, created by the laws of any other state or country, may prosecute in the courts of this state, in the same manner as corporations created under the laws of this state, upon giving security for the payment of the costs of suit, in the same manner that non-residents are required by law to do."

This section, instead of rejecting or modifying the rule of comity, expressly adopts the substance of that rule, so far as the enactment extends, and goes only to confirm the conclusions at which I have arrived.

The next section provides: "But when, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of or made or entered into in consideration of such act."

This section applies only to acts which, by the laws of this state, are forbidden to be done "by any corporation or association of individuals, without express authority of law." It does not apply at all to cases

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where only some particular corporation, or even a particular class of corporations, is forbidden by the laws of this state to do certain things, but only to cases where such prohibition is general, applying to all corporations and all associations of individuals, in this state. It puts the foreign corporations, in all the enumerated particulars, upon the same footing as domestic corporations are placed by those state laws, and those only, which apply generally to all the corporations in the state, but not as some particular corporation or class of corporations may be placed by some law specially applicable to them.

This again is, I think, the proper and generally recognized measure of state comity. A subsequent section makes provision for attachment against foreign corporations. These are all the provisions to be found in our statutes, at the time of this conveyance, having express reference to foreign corporations, which have any possible bearing upon the question here involved.

If we look to the several separate acts of incorporation in force at the time, and endeavor to extract from them a legislative policy in reference to our own domestic corporations, as to the power or capacity in question, we shall find that, owing to the great variety and dissimilarity of the several acts in this respect, no reasonably certain or satisfactory conclusion can be drawn; and no court can safely declare a state or legislative policy upon grounds so utterly unstable and conjectural. Some of these acts gave express power to take and dispose of real and personal estate without any restriction whatever, leaving them exactly upon the same footing as corporations at common law; others allowed them to hold and dispose of real estate up to a certain amount in value; others limited the right by the quantity of acres; some of them restricted the right to such lands as might be required for the

proper corporation buildings and such as might be taken or conveyed to it in payment, satisfaction, or security for debts due the corporation; some neither expressly gave nor restricted the power to take lands, and left the corporation with all the common-law incidents in this respect; and others were very restrictive in confining the right to such lands only as were used in the exercise of their corporate franchises. Under many of them, perhaps most of them, the right to take lands in payment of debts in good faith accruing to the corporation in the prosecution of their business, would be very clear; since this would follow as an incident to any corporation, unless in some way restrained by the charter. It may be true, as a general observation, that the railroad charters granted in the state were more restrictive, in this respect, than those of several other species; but, as I have already shown, so far as material to the question of comity, and what rights of foreign corporations are to be recognized, no distinction in principle can be made between railroad and other corporations; and if the latter have been made more restrictive, as an average, it has been for reasons foreign to the question here involved.

Bearing in mind the great variety and discrepancy, in this respect, in the great number of separate charters or acts of incorporation, as well those granted prior, as those subsequent, to chapter 55 of the Revised Statutes of 1846, let us examine section 7 of the chapter, remembering, however, that it was not competent for the legislature, by these general provisions, to take away from any previously existing corporation any corporate right granted by the charter, and that it was equally incompetent, by any of these provisions, to tie the hands of future legislatures, should they see fit to make any different provisions either in a special charter or by general law. Section 7, which, by its context, applies generally to all cor-

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porations, created or to be created, in this state, declares: "Every such corporation may hold land to an amount authorized by law, and may convey the same." There is no possible view in which this provision was necessary for any purpose. But we are bound so to construe it, if possible, as not to make it pure nonsense. This provision, of itself, neither gives nor takes away any power whatever. It merely recognizes such powers as any such corporation then had, or might thereafter have, "by law." If, by the terms, "may hold land to an amount authorized by law," we are to understand such lands only as, by express provision of statute, they were authorized to hold, then, it has no possible force or operation whatever, and its insertion was sheer nonsense; for, in such case, the corporation would take their authority from the statute conferring it, and not from this general provision, which can neither add to, nor take from, its force; and, upon this theory of interpretation, no possible object could have existed for its enactment. When a statute expressly confers a right, it does not need another statute to declare, or to give it its effect. But if the term, "authorized by law," were intended to include those incidental powers or rights to hold lands, which result, as common-law incidents, from the creation of a corporation, without being expressed, so far as such incidents were not restrained by the legislature; then, though the statute was not necessary, it is not so purely nonsensical as it would be upon the other interpretation; as it may be treated as a declaratory statute merely. It is in this sense, and this only, that it can have any supposable or possible effect upon or application to the various corporations then existing, or thereafter to be created. In effect, therefore, when applied to such corporations, in the light of the existing statutes and the common law, the provision is nothing more than a declaration, that cor-

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porations might hold and convey lands, wherever this common-law right was in no way restrained by the legislature.

I find no other statute, then in force, which can have any possible bearing upon the question. The legislature have, in no respect material to the present case, adopted any policy, or enacted any statute, modifying the generally received doctrine of comity. And I think the company had the capacity to take, and did take, the title to the lands, and that their deed, with that of McCullough, the mortgagee and trustee, conveyed the title to the plaintiff; that the court erred in charging to the contrary, and that the judgment should be reversed, with costs, and a new trial awarded.

COOLEY, J., concurred.

CAMPBELL, J., dissented.

GRAVES, J., did not sit.

Judgment reversed.

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DAY v. THE NEW YORK CENTRAL RAILROAD
COMPANY.

51 New York, 588.

*Commission of Appeals of New York; March Term,
1873.*

Contracts. Lands conveyed under void agreement. In consideration of the conveyance of certain land to a railway company, the company agreed by parol to deliver to the grantor, for temporary keeping and feeding, all the cattle and other live stock transported on a certain portion of its road, the profits of such keeping and feeding to be realized by him. The company complied with the agreement for more than a year, but afterwards refused to perform it. *Held*, that as the agreement was not to be performed within a year, it was void by the statute of frauds; but that the grantor was entitled to recover from the railway company the value of the land conveyed, deducting therefrom the profits realized by him from the business during the time of the performance of the agreement. Such profits, being a part of the consideration, need not be tendered back to the railway company before bringing suit for the value of the land.

Appeal to the commission of appeals of New York, from the general term of the supreme court in the eighth judicial district.

This was an action by Oliver H. Day to recover from the New York Central Railroad Company the value of land conveyed by him to the company in consideration of a parol agreement on the part of the company.

The complaint originally alleged that the plaintiff agreed to convey to the defendant about an acre and

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two-thirds of an acre of land, together with the right of ingress and egress, to and from the land so to be conveyed, to the plaintiff's land, and to build and keep in repair cattle yards and pens for live stock, sufficient to accommodate the shipping or transporting such stock to and from the cars to the plaintiff's land, adjoining the land so to be conveyed, free from any expense to the defendant; and that the defendant should temporarily deliver to the plaintiff, from that time forward, for temporary keeping and feeding, all the cattle, swine, and live stock, which should be transported on its road eastward from the Niagara river, the profits of such keeping and feeding to be realized by the plaintiff; that the defendant, for that purpose, requested the plaintiff to build, make, and construct the necessary yards, pens, and so forth, for the temporary feeding and keeping such live stock; that a conveyance of the land was made by the plaintiff to the defendant, and the necessary yards, pens, and other conveniences for doing business, contemplated by the agreement, were constructed by the plaintiff; that the defendant disregarded the agreement entered into on its part, and refused to allow the live stock transported on its road to be delivered temporarily to the plaintiff for feeding and keeping, and refused to allow the plaintiff the enjoyment of the profits he would have realized by keeping and feeding such stock.

The answer was a general denial.

The action was tried on this issue, and a verdict rendered for the plaintiff. The defendant appealed; and on the appeal the general term ordered a new trial, on the ground that the agreement on the part of the defendant, being verbal only, was void by the statute of frauds, for the reason that it was not to be performed within one year, and also that it created a negative easement on the lands of the plaintiff.

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The plaintiff then amended his complaint, adding thereto a second count setting up a second cause of action which was in the nature of an *indebitatus* assumpsit for land sold and conveyed, for a right of way, for use and occupation of land and premises, for work and labor, care and diligence, and for materials furnished, and for construction of cattle yards, &c., for the defendant.

Upon a second trial a verdict was rendered for the plaintiff. From the judgment entered on this verdict the defendant again appealed; and on the second appeal the general term ordered a new trial, on the ground that the damages should have been confined to the value of the land conveyed by the plaintiff.

On the third trial, a verdict was rendered for the plaintiff for damages only for the actual value of the land conveyed by plaintiff to the defendant, with the interest. Judgment was entered for the plaintiff for that amount accordingly. From this judgment the defendant appealed a third time. The general term affirmed the judgment, and from the judgment of the general term the defendant appealed to the commission of appeals.

John Ganson, for the appellant.

A. R. Potter, for the respondent.

EARL, Com.—The point was not taken by the defendant at any stage of the trial, that the plaintiff had not given sufficient proof, tending to establish the parol agreement claimed by him, to wit: that in consideration of the conveyance of the land to the defendant, it was to give to the plaintiff at his yards and pens the business of temporarily keeping and feeding all the stock which should be transported upon its road eastward from Niagara river. Hence we must assume,

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for the purposes of the appeal, that the parol agreement, as testified to by the plaintiff, was established. We must also assume that this agreement was void under the statute of frauds, for such is the claim on the part of the defendant, and it was upon this theory alone that the recovery was based, and upon it alone the plaintiff seeks to uphold the judgment. As the consideration for the plaintiff's land, the defendant agreed to pay him one dollar and to give him the stock business at his yards. It paid him the one dollar and gave him all the business for the year 1855 and part of it for the year 1856, and out of this business the plaintiff made profits to the amount of about six thousand dollars. And yet he brings this action to recover the entire value of the land conveyed by him on the ground of a total failure of the consideration of his conveyance. A mere statement of the case shows that the action must be without foundation.

If one pays money, or renders service, or delivers property upon an agreement condemned by the statute of frauds, he may recover the money paid in an action for money had and received, and he may recover the value of his services and of his property upon an implied assumpsit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it. *Gillet v. Maynard*, 5 *Johns. (N. Y.)* 85; *King v. Brown*, 2 *Hill. (N. Y.)* 439; *Cook v. Doggett*, 2 *Allen (Mass.)* 439; *Erben v. Lorillard*, 19 *N. Y.* 299; *Richards v. Allen*, 17 *Me.* 296.

While the law in such case will not sustain an action based upon the agreement, it still recognizes its existence and treats it as morally binding, and for that reason will not give relief against a party not in default, nor in favor of a party who is in default in his performance of the agreement.

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A party who has received anything under such an agreement, and then has refused to perform it, ought in justice to pay for what he has received, and hence the law for the purpose of doing justice to the other party will imply an assumpsit.

An assumpsit is never implied except where the justice and equity of the case demand it. A party entering into an agreement, invalid under the statute of frauds, is charged with knowledge that he can not enforce his agreement, and if he, not being in default, has received part of the consideration of his agreement, upon what principle of justice or equity will the law imply an assumpsit on the part of the party in default still to pay the entire consideration? Yet such an assumpsit has been enforced in this case.

Suppose one agree by parol to work for another for ten years for the consideration of five hundred dollars, to be paid at the end of that time, and also a piece of land to be conveyed to him, and at the end of the time, the five hundred dollars be paid and the conveyance of the land refused, can he, upon an implied assumpsit, recover the entire value of his services? If he has received no part of the consideration agreed to be paid to him, the law will imply a promise to pay him what his services are worth, and will enforce such promise. But what shall be done when he has received part of the consideration? He should not be left without any remedy for the balance honestly due him, but upon the same principles of justice and equity the law should imply a promise to pay the balance.

Here the plaintiff was to receive for his land one dollar and the stock business at his yards. The one dollar may be regarded as merely nominal, and the other must be held to be the substantial consideration. The plaintiff expected to get the value of his land in the profits which he should make out of the business which the defendant should give him. This business

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the defendant gave to the plaintiff for one year, at least, just as it agreed to, and out of it the plaintiff appears to have made profits much greater than the value of the land conveyed. These profits were the very consideration contemplated by the parties for the conveyance of the land, and to the extent that the plaintiff has had the business and profits, he has had the very consideration he contracted for. Suppose the defendant had agreed to pay plaintiff one hundred dollars and also to give him the stock business, could the plaintiff in this action after receiving the one hundred dollars recover the whole value of the land, entirely ignoring the money payment? Suppose, instead of giving the defendant land, the plaintiff had paid it money for the same consideration, could he, under the circumstances of this case, recover back all the money paid in an action for money had and received? Clearly not. The very basis upon which the action rests forbids it. As said by Lord MANSFIELD, in *Moses v. Macferlan*, 2 Burr. 1005, "if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt and gives this action founded in the equity of the plaintiff's case." And he says the action "is equally beneficial to the defendant. It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that may go into every equitable defense upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex equo et bono*, is not entitled to the whole of his demand or to any part of it." And in *Longchamp v. Kinny*, 1 Dougl. 137, the same learned judge says: "Great benefit arises from a liberal extension of the action for money had and received, because the charge and defense in this kind of action are both governed by the true equity and con-

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science of the case." It would be against both equity and good conscience to allow the plaintiff in the case supposed to recover all the consideration which he had paid when he had already received a part of the benefit and consideration which he had contracted for. Within the principles laid down in the cases cited he would be permitted to recover the balance only of the money paid by him after deducting the value of so much of the consideration as he had received, and if it could be shown in such case by the defendant that plaintiff had actually received from the defendant upon the agreement more than he had paid, there would be no basis of law or equity for the action to stand on. The same principles of justice and equity should be applied to this case. The plaintiff's equities can be no greater than he paid in land rather than in money. The agreement can not be enforced. Neither party can in this action be allowed any benefit from it or any damage for its breach. The defendant having repudiated the agreement, the plaintiff can recover for his land as if there had been no agreement as to the amount of the consideration, but he must allow so much of the consideration as has been paid; and if he has received more in the profits of the business which the defendant brought to him under the agreement than the value of his land, he can recover nothing. If the profits are less than the value of the land, then he can recover the balance.

It was not necessary for the plaintiff to tender the profits to the defendant before the commencement of the action. They were part of the consideration received by him for his conveyance, and he has the same right to hold them as if so much money had been paid to him by the defendant. His claim is against the defendant for the balance, if any, of the value of the land. These views are fully supported by well recognized principles of law. I find no authority in conflict

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with them, and the case of *Richards v. Allen*, 17 *Me.* 296, is the only authority that has come to my notice directly in point. In that case there was a verbal contract between the plaintiff and defendant for the purchase and sale of a farm, and the plaintiff had delivered to the defendant upon the contract a quantity of brick and a yoke of oxen. After the plaintiff had been in possession of the farm for about twenty years the defendant conveyed it to another person and refused to convey to the plaintiff. He then sued the defendant in assumpsit for the value of the brick and oxen, and it was held that he could recover, but that he must allow for the use of the land. The court says: "But the plaintiff's claim must be limited to what is just and equitable under all the circumstances. He had made some payments, but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it."

My conclusion, therefore, is that the judgment should be reversed and new trial granted, costs to abide event.

JOHNSON, Com., did not sit.

Others concurred.

Judgment reversed.

OSBORNE v. THE CITY OF MOBILE.

16 *Wallace*, 479.*Supreme Court of the United States ; December Term,
1872.*

Taxes. Municipal corporations. A provision of a city ordinance requiring every railroad or express company doing business within the city, and having a business extending beyond the state, to pay an annual license, is not repugnant to the provision of the constitution of the United States which vests in Congress the power to regulate commerce among the several states.

Error from the supreme court of the United States
to the supreme court of Alabama.

This was a criminal prosecution before the mayor of Mobile, Alabama, against Osborne, for carrying on business as agent for an express company without a license, contrary to an ordinance of that city. The ordinance in question required that every express company or railroad company doing business within the city, and having a business extending beyond the limits of the state, should pay an annual license of five hundred dollars, which should be deemed a first-grade license; that every express or railroad company doing business within the limits of the state should take out a license called a second-grade license, and pay therefor one hundred dollars; and that every such company doing business within the city should take out a third-grade license, paying therefor fifty dollars. It subjected any person or incorporated company who should violate any of its provisions to a fine not

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exceeding fifty dollars for each day of such violation.

Osborne was fined for a violation of the ordinance in conducting the business of his agency for an express company, doing a business extending beyond the limits of the state, without having paid the five hundred dollars and obtained the license required. He appealed to the circuit court of the state, which affirmed the judgment of the mayor. He then appealed to the supreme court of Alabama, and that court affirmed the judgment of the circuit court. He then prosecuted a writ of error from the supreme court of the United States to review the judgment of the supreme court of the state.

B. R. Curtis, and *Clarence Seward*, for the plaintiff in error.

P. Phillips, for the defendant in error.

CHASE, Ch. J.—In several cases decided at this term we have had occasion to consider questions of state taxation as affected by this clause of the constitution. In one (*Philadelphia, &c. R. R. Co. v. Pennsylvania*, 2 *Am. Railw. Rep.* 127; 15 *Wall.* 232), we held that the state could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, upon interstate transportation. In another (*Same v. Same*, 2 *Am. Railw. Rep.* 142; 15 *Wall.* 284), we held that a tax upon the gross receipts for transportation by railroad and canal companies, chartered by the state, is not obnoxious to the objection of repugnancy to the constitutional provision.

The tax on tonnage was held to be unconstitu-

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dional, because it was in effect a restriction upon interstate commerce, which by the constitution was designed to be entirely free. The tax on gross receipts was held not to be repugnant to the constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one state to another.

The difficulty of drawing the line between constitutional and unconstitutional taxation by the state was acknowledged, and has always been acknowledged, by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the state in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity.

In the second of the cases recently decided, the whole court agreed that a tax on business carried on within the state and without discrimination between its citizens and the citizens of other states, might be constitutionally imposed and collected.

The case now before us seems to come within this principle.

The Southern Express Company was a Georgia corporation carrying on business in Mobile. There was no discrimination in the taxation of Alabama between it and the corporations and citizens of that state. The tax for license was the same by whomsoever the business was transacted. There is nothing in the case, therefore, which brings it within the case of *Ward v. Maryland*, 12 *Wall.* 423. It seems rather to be governed by the principles settled in *Woodruff v. Parham*, 8 *Id.* 123.

Indeed, no objection to the license tax was taken at the bar upon the ground of discrimination. Its validity

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was assailed for the reason that it imposed a burden upon interstate commerce, and was, therefore, repugnant to the clause of the constitution which confers upon Congress the power to regulate commerce among the several states.

It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the state to legislate, in the absence of legislation by Congress, upon subjects over which the constitution has clothed that body with legislative authority. *License Cases*, 5 *How.* 504; *Willson v. Blackbird Creek Marsh Co.*, 2 *Pet.* 245; *Cooley v. Wardens*, 12 *How.* 315.

But it is not necessary to resort to the principles maintained in these cases for the decision of the case now before us. It comes directly within the rules laid down in the case relating to the tax upon the gross receipts of railroads. In that case we said: "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution." We admitted that "the ultimate effect" of the tax on the gross receipts might "be to increase the cost of transportation," but we held that the right to tax gross receipts, though derived in part from interstate transportation, was within the general "authority of the states to tax persons, property, business, or occupations within their limits."

The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the state, or rather the making of contracts, within the state, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on dray-

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age would be, because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the state.

We think it would be going too far so to narrow the limits of state taxation.

The judgment of the supreme court of Alabama is, therefore, affirmed.

Judgment affirmed.

THE CLEVELAND, PAINESVILLE, & ASHTA
BULA RAILROAD COMPANY v. STATE
OF PENNSYLVANIA.

15 Wallace, 800.

*Supreme Court of the United States ; December Term
1872.*

Taxes. Bonds. Bonds issued by a railway company are property in the hands of the holders; and when held by non-residents of the state by which the company was incorporated, they are beyond the jurisdiction of the state, and are not subject to its power of taxation.

Hence a state law which requires the treasurer of a railway company, incorporated by and doing business within the state, to retain a percentage of the interest due upon bonds of the company, made and payable out of the state to non-residents, citizens of other states, and held by them, is not a legitimate exercise of the taxing power of the state. It is a law which interferes between the company and the bondholders, and, under pretense of levying a tax, commands the company to withhold a portion of the stipulated

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interest and pay it over to the state; thus impairing the obligation of the contract between the parties.

The facts that such bonds are secured by a mortgage, executed simultaneously with them, upon property of the railway company situated within the state, does not render the bonds liable to taxation by the state, under such a law. *So held*, in regard to a statute of Pennsylvania, in which state a mortgage, though in form a conveyance, is held to be a mere security for a debt, and transfers no estate in the mortgaged premises. Such a right has no locality independent of the party in whom it resides.

Error from the supreme court of the United States to the supreme court of Pennsylvania.

This was an appeal by the Cleveland, Painesville, & Ashtabula Railroad Company from the settlement of an account for taxes against the company, made by the auditor-general and state treasurer of Pennsylvania.

The company was incorporated by the legislature of Ohio, and authorized to construct a railroad from the city of Cleveland, in that state, to the state line of Pennsylvania; which road was accordingly built by the company. Subsequently the legislature of Pennsylvania also incorporated the company and authorized it to construct a railroad from the city of Erie, in that state, to the state line of Ohio, to connect with the railroad from Cleveland; and under this authority the road was constructed as designated, and connected with the road from Cleveland, so as to form a continuous line between the cities of Cleveland and Erie.

The affairs of both companies were controlled as one company, by a single board of directors, and the entire line between Cleveland and Erie was managed as one road.

In 1868, the company had issued bonds amounting to two million five hundred thousand dollars, secured by mortgages upon the entire road, the right of way,

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and all the property connected with the road. The bonds were executed and delivered in Cleveland, and nearly all were issued to and afterwards held and owned by non-residents of Pennsylvania.

On May 1, of that year, the legislature of Pennsylvania passed an act relative to taxes upon corporations, of which section 11 provided as follows :

“The president, treasurer, or cashier of every company, except banks and saving institutions, incorporated under the laws of this commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors a tax of five per centum upon every dollar of interest paid as aforesaid ; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the state treasurer for the use of the commonwealth ; and every president, treasurer, or cashier as aforesaid, shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor-general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors during the year ending on that day ; and thereupon the auditor-general and state treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law.”

Under this law, the treasurer of the company, in May, 1869, made a report showing that during the previous year the company had paid interest on its bonds above mentioned, at the rate of seven per cent. amounting to one hundred and seventy-five thousand dollars. Thereupon the auditor-general and the state treasurer apportioned this interest according to the length of the road, assigning to the part within the state of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole

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road, and settled an account for that amount against the company.

From this settlement the company appealed, under the statute of Pennsylvania, to one of the courts of common pleas of that state, by which the validity of the tax was sustained, and judgment for the state was entered accordingly. The company prosecuted a writ of error to this judgment, from the supreme court of the state, which affirmed the judgment; upon which this writ of error was sued out by the company from the supreme court of the United States, under section 2 of the amended judiciary act of 1867.

J. E. Gowen, and *J. W. Simonton*, for the plaintiff in error.

F. Carrol Brewster, and *J. W. M. Newlin*, for the defendant in error.

FIELD, J. [After stating the facts.]—The question presented in this case for our determination is, whether section 11 of the act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the state, issued to and held by non-residents of the state, citizens of other states, is a valid and constitutional exercise of the taxing power of the state, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court can not arrest the judgment of the state court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar, in its essential particulars, to that of *Railroad Co. v. Jackson*, reported in 7 *Wall*. There, as here, the company was incorporated by the legislatures of two states, Pennsylvania and Maryland, under the same name, and its road ex-

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tended in a continuous line from Baltimore in one state, to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both states. Coupons for the different installments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either state. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors, of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the circuit court of the United States for the district of Maryland. That court, the chief justice presiding, instructed the jury, that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax, under the law of Pennsylvania, could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism.

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It is not perceived how the fact, that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland, could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another state, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that state. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest, would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine, that property lying beyond the jurisdiction of the state is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the

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federal constitution, the power of the state, as to the mode, form, and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company, in this case, are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder, is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax commands the company to withhold a portion of the stipulated interest, and pay it over to the state. It is a law which thus impairs the obligation of the contract between

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the parties. The obligation of a contract depends upon its terms, and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract, by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders, five per cent. upon every dollar, and pay it into the treasury of the commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution, levied upon property held in other states, where it is subjected or may be subjected to taxation upon an estimate of its full value.

The case of *Maltby v. Reading, &c. R. R. Co.*, decided by the supreme court of Pennsylvania in 1866, was referred to by the common pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that state. But it is evident, from a perusal of the opinion of the court, that the decision proceeded upon the idea that the bond of the non-resident was itself property in the state, because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the legislature of Pennsylvania can not

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impose a personal tax upon the citizen of another state, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power can not be exercised; but when the property is within our jurisdiction, and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state, that the principle of taxation, as the correlative of protection, is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the commonwealth, and as an investment rests upon state authority, and therefore ought to contribute to the support of the state government. It also adds that, though the loan is, for some purposes, subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that state, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the state which creates and protects a corporation, ought to have the right to tax the loans negotiated by it, though taken and held by non-residents—a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned, if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in what-

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ever manner made payable, it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the state, or that the non-resident had any property in the state which was subject to taxation, within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania, was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bond-holder, or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was, both at law and in equity, a mere security for the debt. That such is the nature of a mortgage in Pennsylvania, has been frequently ruled by her highest court. In *Witmer's Appeal*, 45 *Pa. St.* 463, the court said, "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that state, all possible interest in lands, whether vested or contingent, are subject to levy and sale on execution; yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises can not be taken in execution for his debt. In *Rickert v. Madeira*,¹ *Rawle (Pa.)* 329, the court said, "A mortgage must be considered either as a *chose in action*, or as giving title to the land and vest-

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ing a real interest in the mortgagee. In the latter case it would be liable to execution; in the former, it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out, and subject it to a dower and to the lien of a judgment;" . . . and that it "is but a *chose in action*, a mere evidence of debt is apparent from the whole current of decisions." *Wilson v. Schoenberger*, 31 *Fa. St.* 295.

Such being the character of a mortgage in Pennsylvania, it can not be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that state, owns any real estate there. A mortgage being there a mere *chose in action*, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state, when held by a resident therein; but when held by a non-resident, it is as much beyond the jurisdiction of the state as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property, which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money

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wherever they are. But other personal property, consisting of bonds, mortgages; and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several states, which accord with the views we have expressed. In *Davenport v. Mississippi, &c. R. R. Co.*, 12 *Iowa*, 539, the question arose before the supreme court of Iowa, whether mortgages on property in that state, held by non-residents, could be taxed, under a law which provided that all property, real and personal, within the state, with certain exceptions not material to the present case, should be subject to taxation; and the court said :

“Both in law and equity, the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the state; but the mortgage itself being personal property, a *chose in action* attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the state. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the state; and if not, they are not the subject of taxation.”

In *People v. Eastman*, 25 *Cal.* 603, the question arose before the supreme court of California, whether a judgment of record in Mariposa county, upon the foreclosure of a mortgage upon property situated in that county, could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it

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was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the state; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the state, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the supreme court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Maltby v. Reading, &c. R. R. Co.*, particularly the case of *McKeen v. Northampton County*, 49 *Pa. St.*, 519, and the case of *Short's Estate*, 16 *Id.* 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax can not be sustained; that the bonds, being held by non-residents of the state, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the state. Even where the bonds are held by residents of the state, the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the state. When the property is out of the state, there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra territorial operation; nor can any law of that state, inconsistent with the terms of a contract, made with or payable to parties

out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra territorial invalidity of state laws, discharging a debtor from his contracts with citizens of other states, even though made and payable in the state after the passage of such laws, has been judicially determined by this court. *Ogden v. Saunders*, 12 *Wheat.* 214; *Baldwin v. Hale*, 1 *Wall.* 223. A like invalidity must, on similar grounds, attend state legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds, where the contracts are made and payable out of the state.

It follows that the judgment of the supreme court of Pennsylvania must be reversed, and the cause be remanded for further proceedings in conformity with this opinion; and it is so ordered.

DAVIS, CLIFFORD, MILLER, and HUNT, JJ., dissented.

Others concurred.

Judgment reversed.

Randall v. Elwell.

RANDALL v. ELWELL.

52 *New York*, 521.*Court of Appeals of New York; April Term, 1873.*

Taxes. Cars owned and used by a railway company upon its tracks are personal property, and liable to be seized and sold as such for the collection of a tax against the company.

Appeal to the court of appeals of New York from the general term of the supreme court in the second judicial department.

This was an action by Charles M. Randall, as executor, to recover from John P. Elwell and others, the possession of two horse-railway cars, and damages for the detention thereof. The plaintiff claimed title to the property under a sale for the collection of a tax assessed against the former owner, the Metropolitan Railroad Company, at which sale the cars were purchased by the plaintiff's testator. The defendants claimed under a foreclosure of a mortgage given by that company upon its road. Upon the trial, the court directed a verdict for the plaintiff, and judgment was entered thereupon for the plaintiff accordingly. From this judgment the defendants appealed to the general term, which affirmed the judgment. From the judgment of the general term, the defendants appealed to the court of appeals.

Daniel T. Walden, for the appellants.

H. Sheldon, for the respondent.

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GROVER, J.—The only objection to the validity of the assessment of the railroad company by the assessors, to the levying of the tax, the regularity of the sale by the collector, and the purchase by the plaintiff, was that made upon the motion for a nonsuit, which was that the plaintiff had failed to show a title to the cars in question. This was too general to call upon the court to consider and determine any of the defects now insisted upon by the counsel. The counsel is mistaken in supposing that the evidence proved that the plaintiff was a director of the company at the time of the purchase by him, or that the evidence was such as to render that a proper question for the consideration of the jury if that fact was material. The plaintiff, in substance, testified that he thought he was not a director; that he had been two or three years before that time; had then gone to California, and, for the year preceding the purchase, had not acted as a director at all; and believed he had not been elected as such. It was admitted by the plaintiff's counsel that the company, in its report to the state engineer for the year in which the cars were purchased by the plaintiff, stated that the plaintiff was a director. This report was not evidence against the plaintiff. It did not appear that he had had anything to do with it, or knew anything about it. The questions whether, had the plaintiff been a director at the time of his purchase it would have any and what effect upon the title, do not arise and will not be considered. The conclusion of the judge upon the trial, that the testimony proved that the plaintiff purchased the cars for himself, and thereby acquired title thereto, was correct. There was no conflicting evidence as to these facts. There was a conflict as to the value of the cars, and of their use while detained by the defendants. The counsel for the respondent states, in his points, that the parties finally agreed upon these facts, and refers to the folio that he

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claims shows it, which, upon examination, I think hardly sustains the counsel; but as the judge, in his direction to the jury to find a verdict for the plaintiff, fixed the specific sums which were to be found as the value of the cars, and of their use while detained by the defendants, and as no specific objection was made to either of the sums so fixed by the defendants' counsel, or any point made in this court founded thereon, I shall assume that such agreement was made.

The only remaining question is whether the cars were the personal property of the company against which the tax was levied, or a part of its real estate. If the former, no question can be made but that the collector had the right to levy on and sell them for the purpose of collecting the tax; being at the time in possession of the company, against which the tax warrant was issued, irrespective of the lien or title of any other person by mortgage or otherwise. 1 *Rev. Stat.* 378, § 2. If the cars were a part of the real estate, it is equally clear that the collector had no right to levy upon or sell them; and that the plaintiff, by his purchase at such sale, acquired no title thereto, as a collector of taxes has no power to sell real estate. The question is whether the rolling stock of a railroad company is real or personal property. It is obvious that the mode of propelling the cars, whether by steam, horse, or any other power, can have no bearing upon the question. The question does not at all depend upon the length of the road, or whether the road of one company connects with that of others of the same gauge, and the companies so connecting, in the transaction of their business, are in the habit of running the cars of each over all the roads so connecting (as is often done), or whether the road has no connections, and, consequently, in the transaction of its business, its cars do not run beyond its own track. I think no one would claim that a car of the New York Central.

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which, in the course of business had been run to Chicago, was part of its real estate while there ; and, if not such, I can discover no principle upon which the character of the property should be changed when it reached the Central track upon its return trip to New York. It must be borne in mind that the defendants in this case can claim no equity upon the ground that they acquired title by purchase upon the foreclosure of a mortgage given to secure the bonds of the company, as the collector's warrant overrides all equities of third persons in the property. The question is presented, free from embarrassment, whether cars, while owned and used by the company upon its track, were real estate or personal property. My conclusion is that they were personal property, and, as such, liable to be seized and sold for the collection of a tax against the company. The reasons upon which this conclusion is based will be found in *Stevens v. Buffalo, &c. R. R. Co.*, 31 *Barb.* (N. Y.) 590, and in *Beardsley v. Ontario Bank*, *Id.* 619, and the authorities cited and reviewed ; and a repetition here is unnecessary. The reasons and authorities for holding that the cars were real estate will be found clearly and ably set forth in *Farmer's Loan, &c. Co. v. Hendrickson*, 25 *Barb.* (N. Y.) 485.

The judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

IV.—25

Boston, &c. R. R. Co. v. Greenbush.

THE BOSTON & ALBANY RAILROAD COM-
PANY v. GREENBUSH.

52 *New York*, 510.

Court of Appeals of New York; May Term, 1873.

Eminent domain. Highways. Where a statute authorized the construction of streets and highways across a "railroad track," without compensation to the owners of the track,—*Held*, that the word "track" should be limited to the track used for public traffic and for turn-outs and switches, and did not include tracks used for storing cars, or exclusively for making up trains. But a finding that certain tracks across which it was proposed to lay out a street were in "constant use for passing trains, and for switching off cars and making up trains," would not relieve the premises from the operation of the statute.

Appeal to the court of appeals of New York from the general term of the supreme court in the third judicial department.

This was an action by the Boston & Albany Railroad Company to restrain the president and trustees of the village of Greenbush from opening a street across the tracks of the railroad company in that village. The court, upon trial without a jury, found in favor of the defendant, and judgment for the defendant was entered accordingly. From the judgment the plaintiff appealed to the general term, by which it was affirmed. From the judgment of the general term the defendant appealed to the court of appeals.

George W. Miller, for the appellant.

Amasa J. Parker, for the respondent.

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CHURCH, Ch. J.—The validity of the act of 1853, authorizing the laying out of streets and highways across the track of railroads, without compensation to the owners of such railroads, was affirmed in *Albany, &c. R. R. Co. v. Brownell*, 24 *N. Y.* 345, upon grounds entirely satisfactory to this court, and we concur in the construction of the act given in that case. The only debatable question is whether the track proposed to be crossed is such a track as is authorized by the act to be crossed without compensation. The "track" specified in the act may include one or more single tracks, but should, I think, be limited to the track used for public traffic, whether composed of one or more, including turn-outs and switches, or in other words, what may fairly be regarded as the roadway. Grounds upon which tracks are laid for storing cars, or exclusively for making up trains, are not embraced in the term "track."

The finding of fact is that the seven tracks proposed to be crossed are in "constant use for passing trains, and for switching off cars and making up trains." This finding does not relieve the premises from the operation of the statute. We can not infer that these grounds were used substantially for storing cars. On the contrary, the import of the finding is, that although in constant use for passing trains, the tracks were also used for switching off cars and making up trains. This might be done at any point on the road where there is a turn-out or switch.

The finding is controlling upon this point, and the judgment must be affirmed.

All concur.

Judgment affirmed.

Prouty v. Lake Shore, &c. R. Co.

PROUTY v. THE LAKE SHORE & MICHIGAN
SOUTHERN RAILWAY COMPANY.

52 *New York*, 363.

Court of Appeals of New York ; April Term, 1873.

Consolidation. Contracts. Where several railroad companies are consolidated, forming a new company, such consolidated company, so far as concerns the creditors of one of the original companies, is the successor of that company, in respect to the property formerly owned by that company; but in respect to the properties of the other companies, it is a new and independent corporation; such creditors have no claim against it upon their original contracts, but only by virtue of its assumption of the obligations of the old companies.

Upon such a consolidation, the officers of the new corporation, so far as the trust devolves upon them of managing property formerly owned by one of the old companies, occupy in relation to its creditors the position of successors to its officers, and are bound by all proceedings had against them; but as to the properties formerly of the other companies they are successors to the officers of those companies, against whom such creditors have no right of action upon their original contracts.

Hence, where an action had been brought against a railway company and its officers upon a contract with the company, and such company was consolidated with others into a new corporation after a report of a referee had been made in the action directing judgment for the amount claimed, and restraining defendant from making any dividends until the amount was paid,—*Held*, that a subsequent order, substituting the consolidated company and its officers as defendants, was erroneous, as it made them liable upon the original contracts, and subjected them and all the funds and property of the consolidated company to the restraint adjudged against the old company.

Appeal to the court of appeals of New York from the general term of the supreme court in the first judicial department.

Prouty v. Lake Shore, &c. R. Co.

This was an action by John S. Prouty against the Michigan Southern & Northern Indiana Railroad Company, and the directors and treasurer of that company, to recover a balance of certain dividends.

The complaint alleged that the corporation defendant had issued, in 1857, certain guaranteed ten per cent. stock, known as "construction stock," the dividends upon which were agreed to be paid in preference to dividends on the common stock; that the company did not pay dividends on this "construction stock," as guaranteed by it, but, on the contrary, treated it and the common stock alike in the payment of dividends, without discrimination; that the plaintiff was the owner of four hundred and eighty-four shares of such stock; that he had received whatever dividends the company declared, but that he received payment thereof under protest; that the company guaranteed the payment of the ten per cent. on such "construction stock," and had, between 1857 and 1863, realized net earnings primarily applicable to the payment thereof.

The complaint prayed that an accounting be had, and that the company be adjudged to pay the plaintiff and all others similarly situated the balance of such ten per cent. dividends; also, that the company be restrained from paying any other dividends till such balance be first paid.

After the action was brought, the corporation defendant consolidated with the Lake Shore Railway Company, forming a new corporation under the name of "The Lake Shore & Michigan Southern Railway Company," as authorized by the laws of the state; and a few months later the new company in like manner consolidated with the Buffalo & Erie Railroad Company, pursuant to the laws of the states of New York, Pennsylvania, Ohio, Indiana, Illinois, and Michigan, the new company taking the name of "The

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Lake Shore & Michigan Southern Railway Company.”

Subsequently to both these consolidations the action was referred. No knowledge of the proceedings before the referee was shown on the part of the consolidated corporation; nor did the referee's report, when made, refer to either of the consolidations or to the consolidated companies. It directed judgment for the plaintiff for the amount of the dividends claimed, with interest; and also that the Michigan Southern & Northern Indiana Railroad Company, its officers, agents, &c., and their successors, be restrained from laying out, expending, disposing of, or in any manner charging the property and assets of the company, or its rights and franchises, until such amount should be paid.

After the coming in of this report, the plaintiff moved that the Lake Shore & Michigan Southern Railway Company, its directors and treasurer, should be substituted as defendants in place of the Michigan Southern Railroad Company, its directors and treasurer, the original defendants. The motion was granted, and the Lake Shore & Michigan Southern Railway Company, its directors and treasurer, were substituted as defendants accordingly. From the order of substitution, they appealed to the general term, which affirmed the order; and from the order of affirmance by the general term, they appealed to the court of appeals.

James Matthews, for the appellants.

Lucien Birdseye, for the respondent.

THE COURT.—In so far as the property formerly of the Michigan Southern & Northern Indiana Railroad Company is concerned, the present consolidated com-

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pany is the successor of the former company ; but in respect to the properties of the other companies, which have joined in the consolidation, it is a new and independent company as to the creditors of the old Michigan Southern & Northern Indiana Railroad Company, and they have no claim upon such new company under their original contracts, but only by virtue of the assumption by the new company of the obligations of the several corporations which united in the consolidation. So of the individual defendants. In so far as the trust devolves upon them of managing the property formerly of the old company, they occupy, in relation to the plaintiff, the position of successors to the individual defendants named in the complaint, and are bound by all proceedings had against their predecessors. But as to the other properties which have come under their charge, they are successors to officers of other companies, against whom the plaintiff had no right of action upon his original contract. Therefore, both as to the corporation defendant, and the individual defendants brought in by the order of substitution, if the only effect of the substitution was to continue against them proceedings which affected the property of the original defendants, the case would be simply one of the substitution of new parties representing the same interests as the original defendants, and this might properly be done by motion within one year. *Code*, § 121.

But the effect of the substitution in the present case is much more extensive. It not only continues the proceedings against the successors of the original defendants, but against a corporation, and the treasurer and directors thereof having control of and being vested with the property formerly of two other companies, not originally liable upon the contract, by virtue of which the plaintiff claims ; and subjects the property of those two companies to a decision rendered

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subsequently to the consolidation in an action to which they were not parties.

In the action as originally brought, the defendant being a foreign corporation, a judgment could only be enforced against such of the property of the defendant as could be found within this state, and by personal remedies against such of the officers as resided within this state or were here found and served with process in the action. By the decision of the referee, the directors and treasurer of the original corporation defendant were not only required to pay the amount found due to the plaintiff for back dividends, but were also restrained from making any disposition of the funds, effects, or property of the corporation defendant or any part thereof, and from declaring or paying any dividends on its common stock, until the claims of the plaintiff, and all other holders of the guaranteed stock described in the complaint, should be satisfied in full. The substitution of the present consolidated company and its officers as defendants in place of the old Michigan Southern company and its officers, the original defendants, makes all these provisions obligatory upon the substituted defendants, and subjects them and all the funds and property of the consolidated company to the restraint adjudged against the old Michigan Southern company.

It may be that the obligations which the consolidated company has assumed render it just that such a judgment should ultimately be rendered against it. But however clearly it may appear that the plaintiff and those in whose behalf the action purports to be brought are entitled to such a remedy, it can legally be obtained only in an action against the parties affected, founded upon their assumption of the liabilities of others, and not by the summary process of a motion to insert their names as defendants, and thus to apply

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to them an adjudication previously made against the original debtors.

The order appealed from should be reversed, with costs.

PECKHAM, J., did not sit.

Others concurred.

Order reversed.

McMAHON v. MACY.

51 *New York*, 155.

Commission of Appeals of New York; September Term, 1872.

Contracts. Individual liability of stockholders. One who, with his hired men and horses, had rendered services in the construction of a railway to the contractors with the railway company for its construction, upon the failure of the contractors to pay him, brought his action against the company, as the laws of the state in such cases permitted (*N. Y. Laws of 1850*, ch. 140, § 12), and recovered judgment, execution upon which was returned unsatisfied. Afterwards he brought an action against one whom he alleged to be a stockholder in the railway company, under a statute which provided that each stockholder of such a company should be "individually liable to the creditors of such company, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company;" and that all the stockholders should be "jointly and severally liable for the debts due or owing to any of its laborers

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and servants, other than contractors, for personal services for thirty days' service performed for such company; but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation." Upon these provisions,—

Held, 1. That no action could be sustained by the plaintiff independent of his judgment; under the first clause, because he was not a creditor of the company, but of the contractors; nor under the second clause, because he was not himself a laborer or servant of the company.

2. That effect could only be given to the judgment, either by treating it as conclusive evidence of a debt existing when the action was brought, or as itself a debt, constituting the plaintiff a creditor of the company at and from the date of the recovery. Upon the first theory, the defendant in this case could not be held liable, as the debt would be barred by the statute of limitations; nor could he be held upon the second theory, as before the rendition of the judgment he had ceased to be a stockholder.

In an action, under such a statute, to enforce the liability thereby imposed upon a stockholder, evidence is admissible upon the part of the defendant, to show that an assignment of stock, absolute upon its face, was in fact given to him as collateral security, and was held by him for that purpose only.

It seems, that, in such an action, proof of a judgment against the company is neither conclusive nor *prima facie* evidence of the existence of a debt against the company. Even if such a judgment were deemed *prima facie* evidence of such indebtedness, where it appears that an inseparable part of the judgment was for labor and services not performed by plaintiff himself, it is not a debt for which a stockholder is liable, and plaintiff, therefore, could not recover.

Appeal to the commission of appeals of New York from the general term of the supreme court in the third judicial district.

This was an action by Michael McMahon to recover from Charles A. Macy, as a stockholder holding unpaid stock of the Sackett's Harbor & Saratoga Railroad Company, an alleged debt of that company to the plaintiff. The facts are stated in the opinion.

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Upon trial before a referee, the referee reported in favor of the plaintiff, and judgment thereupon was entered for the plaintiff. From this judgment the defendant appealed to the general term, which affirmed the judgment. From the judgment of the general term the defendant appealed to the commission of appeals.

Charles Tracy, for the appellant.

John Costigan, for the respondent.

EARL, Com.—During the months of October and November, 1854, Wilkins, Decker & Co. were contractors on one of the sections of the Sackett's Harbor & Saratoga railroad; and during these months the plaintiff worked for them upon the railroad in person, and with his hired man and team; and they failed to pay him for the work from October 15 to the 19th day of the next month. On December 21, 1854, the plaintiff commenced an action in the supreme court against the railroad company to recover the amount due him from the contractors for this work; and on March 31, 1857, he recovered a judgment against it for the sum of two hundred and forty-eight dollars and eight cents, damages and costs. From this judgment it appealed to the general term of the supreme court, and the judgment was affirmed, and a judgment was entered for costs upon the appeal, May 27, 1858, for sixty-seven dollars and nineteen cents. It then appealed to the court of appeals, and the judgment was again affirmed, and judgment for costs upon that appeal was entered December 26, 1861, for one hundred and fifty-seven dollars and sixty-nine cents. Executions were issued upon all these judgments and returned wholly unsatisfied.

Then this action was commenced against this de-

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fendant, September 4, 1864, and a recovery was had for the whole amount of these judgments, with interest and costs.

On August 11, 1854, Stanton & Wilcox transferred to the defendant one share of the capital stock of the company; and on October 20, 1854, two thousand five hundred shares; and on the last named day H. Stanton transferred to him three thousand nine hundred and seventeen shares. These transfers were all absolute in form, and were made upon the books of the company. They all stood on the books in the name of the defendant until November 3, 1854, when he transferred three thousand eight hundred and thirty-five shares to John Hollister, and the remainder of the shares continued in his name until March 21, 1855, when he transferred them all to E. C. Hamilton. But ten per cent. had been paid upon this stock. It was transferred to the defendant by Stanton, to be held as collateral security for a debt due him from Stanton, and he paid no consideration for the transfer. The defendant transferred the stock, as above stated, at the request of Stanton, receiving no consideration for the transfers. It was as a holder of this stock, that the defendant was sought to be made liable and was held to be liable in this action.

It is supposed that the recovery was had against the railroad company under section 12, chapter 140 of the *Laws of 1850*, which makes every railroad company, upon certain conditions, liable for work performed by any laborer for a contractor engaged in the construction of its road.

This action against the defendant is based upon section 10 of the same act, as amended by chapter 284 of the *Laws of 1854*, which is as follows:

“Each stockholder of any company formed under this act shall be individually liable to the creditors of such company, to an amount equal to the amount un-

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paid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such executions shall be the amount recoverable, with costs, against such stockholders; before such laborer or servant shall charge such stockholder for such thirty days' service he shall give him notice in writing, within twenty days after the performance of such services, that he intends so to hold him liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation in ratable proportion to the amount of the stock they shall respectively hold with himself."

If the plaintiff stood here without any judgment against the company, relying solely upon his original claim for work done for the contractor, it would not be claimed that he could succeed in this action. He was not a laborer for the company, and hence could not recover against the defendant under the second clause of section 10. He was not a creditor of the company, but of the contractor, and hence it is not certain that he could recover under the first clause of the section. And, in any event, his cause of action would be barred by the statute of limitations. Hence, if this recovery is to be upheld, it must be by reason of some effect to

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be given to the judgments against the company. What effect should be given to them in such an action as this is not entirely certain, as there is much conflict in the decisions upon the subject. I will, however, assume, as claimed by the counsel for the plaintiff, that the judgments are conclusive upon the defendant.

Under section 10, the plaintiff was not required to sue the company, as a condition precedent, before he could, as a creditor, enforce his debt against the defendant as a stockholder. Such a condition is required only in the case of a suit against a stockholder under the second clause of the section for a recovery of a debt due to a laborer or servant of the company. This view of the section is justified by the whole framework of the section, and is demonstrated by its grammatical construction. Hence, if we assume that the judgments are conclusive as evidence, that the debt was, as alleged in the complaint, contracted in 1854, and that the defendant can not dispute it, and that this action is brought to recover the debt thus conclusively established, yet the plaintiff must fail, as the debt, under this view of the case, was barred by the statute of limitations. The cause of action, under this view, accrued in 1854, and the defendant could have been sued at once. But if we assume that the judgments are not merely conclusive evidence of a debt of the company contracted in 1854, but that they are themselves debts constituting the plaintiff, at their dates, a creditor of the company, and that this action is founded upon such judgments for the recovery of them, as debts against the company, of the defendant as a stockholder, yet there is an insuperable difficulty in the way of a legal recovery in this case. Upon this assumption the plaintiff became a creditor of the company at the time his first judgment was recovered, which was on March 31, 1857, more than two years after the defendant had parted with his un-

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paid stock, and had ceased to be liable as a stockholder.

We must treat the first judgment recovered either as conclusive evidence of a debt existing and due the plaintiff from the company in November, 1854, or as itself a debt constituting the plaintiff a creditor of the company at and from its recovery. It can not be treated in any other way, nor receive any other effect, and hence, for the reasons stated, it can not form any basis for upholding the recovery in this action.

We might stop here, and there would be ample reason for reversing the judgment below; but there is still a further reason for doing so. It was shown upon the trial that the stock was transferred to the defendant, as collateral security for a debt due him from Stanton, and that it was held by him for that purpose only. The referee refused to give any effect to this evidence, holding that parol evidence could not be received to contradict or vary the written assignments or transfers, which were absolute in form. In this he erred. It is always competent to show that an assignment or conveyance, absolute in form, was only intended as a security. *Hodges v. Tennessee, &c. Ins. Co.*, 8 *N. Y.* 416; *Despard v. Walbridge*, 15 *Id.* 374; *Sturtevant v. Sturtevant*, 20 *Id.* 39. There is nothing in any statute which makes the books of the company the incontrovertible evidence of ownership of stock. A person may be the absolute, legal, and equitable owner of stock without any transfer appearing upon the books. *McNiel v. Tenth Nat. Bank*, 46 *N. Y.* 325.

Section 11 of the general railroad act of 1850 provides that no person holding stock in any railroad company, as collateral security, shall be personally liable as a stockholder, but the person pledging the stock shall have the liability as stockholder. Under this law the evidence that the stock in question was

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assigned to the defendant as collateral security should have been received and considered, and should have secured to the defendant exemption from liability on account of the stock.

I therefore reach the conclusion that the judgment should be reversed and a new trial granted, costs to abide event.

GRAY, Com.—Following the plaintiff's allegation in his complaint, that the defendant was a stockholder in the Sackett's Harbor & Saratoga Railroad Company, and that a certain amount remained unpaid upon his stock, is the allegation that on March 31, 1857, he recovered judgment against that company for the sum of two hundred and forty-eight dollars and eight cents, damages and costs, "for a debt contracted by them." It does not appear from the skeleton statement of the judgment given in evidence or otherwise, except from the report of the referee, for what cause of action the judgment was recovered. From that, it appears that the recovery, instead of being for a debt contracted by the company, was for work, labor, and services performed by the plaintiff himself "and his hired man and team," for certain contractors engaged in constructing for the company a section of their road. The only question I propose to discuss arises upon the defendant's exceptions to the rulings of the referee, which were, in substance, that the judgment, as stated in his report, warranted a recovery by the plaintiff against the defendant in this action as well for the labor performed by the plaintiff's man and team as for the labor and services performed by the plaintiff in person.

Whether a judgment against a company is in a separate action against a stockholder for the recovery of the same debt, evidence of the debt sued upon, presents a question which has been much litigated in

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this state, and yet never decided in any of its courts of last resort. As early as 1822, SPENCER, Ch. J., as a member of the court for the correction of errors, without alluding to the fact that the liability of stockholders, when sued separately, was remote and dependent upon the contingency of the ability of the creditor to collect his debt by execution against the company, or the relation of the stockholder, when thus sued, to the company, held that as the debt against the company was also a debt against the stockholder individually, and because the company itself was concluded by the judgment, the stockholder when sued alone was equally concluded. See *v. Bloom*, 20 *Johns. (N. Y.)* 669, 684. This opinion was afterward referred to with apparent approbation in *Moss v. Oakley*, 2 *Hill (N. Y.)* 265, 267, the decision of the question not being regarded as necessary to the decision of the cases to which I have referred, but simply as the individual expression of a single judge in each case. The question was again presented in *Moss v. McCullough*, 5 *Hill (N. Y.)* 131, in which, after a full review of all the cases, and a discussion of the principle involved, by Justices COWEN and BRONSON, the court held, NELSON, J., concurring, that a judgment against the company was not, as against a stockholder when sued separately for the same debt, even *prima facie* evidence of the debt sued upon. The case went back and was retried, and upon the same facts appearing, the plaintiff was nonsuited. Then, after the change wrought in our judicial system by the constitution of 1846, the same case was brought before the general term of the fourth judicial district, where a motion for a new trial prevailed, the court holding, among other things, that the judgment against the company was, in a separate action against stockholders, *prima facie* evidence of the debt sued upon. 7 *Barb. (N. Y.)* 279, 296. Whether a new trial was

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had, or what was the ultimate disposition of the case, does not appear from the reports. The question continuing to be unsettled, came up in the court of appeals in March, 1860. *Belmont v. Coleman*, 21 *N. Y.* 96. So far as appears from the report of that case, seven only of the eight judges, of which it was then composed, were present. Other questions were involved. *BACON*, J., who delivered the opinion of the court, held that the judgment against the company was, in a suit against a stockholder for the same debt, *prima facie* evidence of the debt; in this view two of his associates concurred, and four "refused to commit themselves to the doctrine that a judgment against the corporation was even *prima facie* evidence against a stockholder" (*Id.* 102), and the case was disposed of upon other grounds. In July, 1861, the question was again presented to the supreme court, of which Justice *BACON* was at the time the presiding justice, and it was then, by the unanimous judgment of the court, held that a judgment against the company was not even *prima facie* evidence in a suit against a stockholder for the recovery of the same debt. *Strong v. Wheaton*, 38 *Barb. (N. Y.)* 616, 621. If, therefore, the defendant is not sustained by the weight of authority, he is certainly not so prejudiced by adjudged cases as to prevent the question presented from being considered as if it was now presented for the first time. In cases where, as the plaintiff in this case assumes it to be indispensable to his right to recover against a stockholder that he should first recover judgment against the company for the same debt, after establishing the organization of the company, and that the defendant is a stockholder, three other things must be established by him, viz.: the existence of the debt, the recovery of the judgment, and the issuing and return of execution unsatisfied. The failure of either would defeat the action. Neither of these facts are

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by statute made evidence of the existence of either of the other facts. In order, therefore, to determine whether, at common law, the judgment against the company was evidence as against the defendant, a stockholder, in this separate action against him for the same debt, it becomes necessary to ascertain the relation which the stockholder, when thus separately sued, bears to the company. The right of the plaintiff and the liability of the defendant when separately sued is, in brief, this: if his debt against the company could have been collected by execution upon his judgment the defendants are not liable; but if it could not, they are. To get more clearly at the relation between the company and its stockholders, let us carry out a case suggested by Cowen, J., in *Moss v. McCullough*, and suppose the statute to be silent on the subject of the individual liability of the stockholders, and, instead of a liability thus created, it had been created by contract, commencing with a recital, "That, whereas, the defendant is a stockholder in the company and desirous of giving it credit; and in consideration thereof, and that the plaintiff will render services and furnish materials for the use of the company, he agreed that, in case of the failure of the plaintiff to collect of the company the sum for which he should give it credit by judgment and execution, he would, in that event, pay the debt or any deficiency that should remain, after the return of execution, to the amount of the stock held by him in the company," it would amount to the same thing. The fact that one liability is created by statute, and the other by contract, is quite immaterial; both being subject to the same rules of interpretation, leave the parties bearing the same relation to each other they would if both had been created by contract; and that relation is manifestly that of a mere guarantor that the debt is collectible of the company. Holding that relation, the judg-

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ment against the company was not even *prima facie* evidence in this separate suit against the defendant. *Jackson v. Griswold*, 4 *Hill* (N. Y.) 522, 529, 530. The only purpose for which the judgment could be used as evidence would be after the existence of the debt had been established, to prove that it had been prosecuted to judgment against the company as one step requisite to establish the defendant's liability. If the judgment is even *prima facie* evidence, not having been made so by statute, I am unable to understand why it is not, like a judgment in any other case, conclusive. But assume it to be *prima facie* evidence of what it contains, leaving the defendant to show that the plaintiff was not, in law, entitled to such recovery, and the judgment itself, as stated in the report of the referee, being for an inseparable part of its amount for labor and services, not performed by the plaintiff himself, furnished, as the court of appeals have held (*Atchison v. Troy, &c. R. R. Co.*, 5 *Abb.* (N. Y.) *Pr.* 329), a valid objection to the recovery, had the defendant had his day in court to make it, and hence the judgment should be reversed.

All concurred with EARL, Com.

LOTT, Ch. Com., concurred with GRAY, Com., that the judgment against the company is no evidence whatever of indebtedness against the stockholders.

HUNT, Com., concurred with GRAY, Com., that the record shows that the judgment was recovered against the corporation, for causes of action for which stockholders are not liable; and that the judgment should be reversed for that reason. He also held that the judgment against the corporation was *prima facie* evidence against the stockholder.

Judgment reversed.

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THE PITTSBURGH, FORT WAYNE, & CHICAGO
RAILWAY COMPANY v. FAWSETT.56 *Illinois*, 513.*Supreme Court of Illinois; September Term, 1870.*

Contracts. Agents. Evidence. A contract for the transportation of cattle over a railway was entered into between the shipper and an agent of the railway company, who was its agent only for the purpose of procuring cattle shipments over its road. The contract was made with knowledge on the part of the shipper that, by the ordinary routine of such business as transacted by the company, the money for drawbacks from the freight agreed upon would come to him through the hands of such agent, and to that routine the shipper gave his assent. *Held*, that the agent of the company became the agent of the shipper for the purpose of receiving the money, whether the latter gave him distinct authority so to do or not, and a payment of the money, by the company, to such agent, would exonerate it from any further liability to the shipper in respect thereto. And documentary evidence, tending to prove that the company had paid the money to the agent, was admissible in behalf of the company.

Contracts. A contract between a shipper of cattle and a railway company, by which it was agreed that the shipper should be allowed the same drawbacks from the freight charged him upon his shipments which other companies were allowing him,—*Held*, not to relate to shipments made before the contract was entered into, but to future shipments only.

Appeal to the supreme court of Illinois from the superior court of the city of Chicago

This was an action of assumpsit by Asbury F. Fawsett and Jacob J. Bankard to recover from the Pittsburgh, Fort Wayne, & Chicago Railway Company

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certain drawbacks on freight paid to the defendant upon shipments over its road by the plaintiffs. The facts in the case, upon which the questions discussed arose, are stated in the opinion. Upon the trial, the jury found a verdict in favor of the plaintiffs, and thereupon judgment for the plaintiffs was entered. From this judgment the defendant appealed.

F. H. Winston and *George C. Campbell*, for the appellants.

Walker, Dexter, & Smith, for the appellees.

BRESE, J.—The only questions raised on this record important to be considered are, first, the ruling of the court on the documentary evidence offered by appellants on the trial below; second, the time at which the contract for drawbacks commenced, as affecting the amount of the verdict; and last, instruction five asked by the defendants and refused.

That the documentary evidence offered by appellants, in regard to drawbacks on three hundred and ninety-eight cars, saving and excepting the order purporting to have been indorsed by Fawsett, but not in his handwriting, was proper to go to the jury, will be apparent from the consideration of the character of appellees' claim.

It is in proof McPherson was not connected with appellants in any other capacity than as agent to procure cattle shipments over appellants' road; that he contracted with Fawsett in June, 1863, that appellants should allow him the same drawback on his shipments of cattle that was allowed him by the Pennsylvania Central and Northern Central, over whose roads the cattle shipped by appellants' road would pass to the Baltimore market.

Fawsett, in his testimony, says, he looked to Mc-

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Pherson to have the papers arranged so that he could get the drawbacks; intended to take the general routine to do the business; repeatedly asked McPherson to get the papers into shape; thinks very likely he knew the general course of business was that the money was paid by the company to McPherson.

This testimony was given when recalled to rebut the testimony of McCullough, given in his deposition. In his first examination in chief, he testified that he never received money from appellants on account of drawbacks; he applied only to McPherson for payment of drawbacks; during the period of his shipments, he never stated the contract to any officer of the road; went often to McPherson in 1863-4-5, demanding his drawbacks, but did not go to the officers of the road; made his contract with McPherson; he promised to pay.

Fawsett distinctly states, the usual routine of doing such business was to be taken. What that routine was is shown by the testimony of Louis Erickson and John Wolwork, employes of McPherson, the first named as book-keeper and the other as shipping agent, and by S. J. Glover, the cashier of appellants. From the testimony of these witnesses, the routine of business in regard to drawbacks is clearly established, and was pursued, as the documentary evidence excluded shows. By pursuing that routine, of which Fawsett had full knowledge, the money for drawbacks would necessarily come into McPherson's hands, and that it did so come on these three hundred and ninety-eight cars there can not be the least doubt. It is immaterial whether Fawsett gave McPherson distinct authority to receive the money or not; by the routine of the company in such cases it was bound to come to McPherson's hands, and to this Fawsett testified he submitted. There can not be the least doubt that the drawback on these cars, amounting to nine hundred and ninety-five

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dollars, was paid by the company to McPherson, and the evidence excluded should have been admitted as tending to show it at least.

In another aspect of the case this testimony was proper, for it appears that in the year following, in 1866,—a few months after the receipt of this money,—McPherson brought an action against Fawsett, claiming from him more than twenty thousand dollars on a cattle contract. To this action Fawsett pleaded a set-off, and swore to the plea. In answer to the question, "Had you then a set-off against McPherson for the whole amount of his claim?" Fawsett answered: "There was something coming to me—money that had been loaned, or got into his hands some way or another; I gave him twenty-one thousand dollars or twenty-two thousand dollars, and whatever was coming to me at that time; I think it was four thousand dollars or five thousand dollars McPherson owed me, which he allowed in this settlement."

Now, as no figures, vouchers, or other papers were produced by Fawsett, showing the basis on which this settlement was made, was it not a proper question for the jury, did not these nine hundred and ninety-five dollars, which the documentary evidence excluded tended to show McPherson received as drawbacks on these cars, form a part of the four thousand dollars or five thousand dollars McPherson allowed Fawsett on the settlement made in 1866? It would be fair and reasonable so to argue before the jury, as, in a settlement of a claim so large as the one in suit, it is highly improbable Fawsett, in defending against it, would have omitted so large an item as nine hundred and ninety-five dollars. McPherson's lips are sealed in death; probabilities must plead in his favor. While Fawsett says he is positive, in his settlement with McPherson, he did not set off his claim for drawbacks, he must be understood to mean, not this particular item

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of money collected for drawbacks, by McPherson, but the claim out of which this suit arises; for Fawsett always knew, so we infer from the testimony, that the company had not paid all the drawbacks claimed.

In this connection the third question may properly be disposed of, and that is, the refusal of the court to give this instruction :

“V. If the jury believe, from the evidence, that Fawsett authorized and directed McPherson to collect his drawbacks for him, then any payment made by the defendants to McPherson, on account of such drawbacks, was a payment to the plaintiffs, and they can not recover payment for such drawbacks a second time.

“And if the jury believe, from the evidence, that McPherson, as agent for Fawsett and Bankard, did collect the drawbacks for them, upon three hundred and ninety-eight cars of cattle, then no further drawbacks can be collected from defendants upon the three hundred and ninety-eight cars.”

From what we have already said, this instruction was proper, because the evidence was incontestible, that the drawbacks were to be paid to McPherson; that they were to come through his hands. He was the agent of Fawsett to receive the drawbacks, as appears from Fawsett's testimony. He never applied to the company for the drawbacks, always expected to get them through McPherson, and if McPherson received this particular drawback, the company should not be obliged to pay it a second time, the more especially when it is seen that these parties, Fawsett and McPherson, shortly after the receipt of the money by McPherson, had a full settlement of heavy claims, in which, it is extremely probable, this sum of nine hundred and ninety-five dollars was fully accounted for by McPherson.

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The remaining point is, at what time did this contract to pay drawbacks commence?

It appears that Fawsett had been shipping cattle on this road from April, 1863, to May 2, 1865, but no contract was made in relation to drawbacks until the summer of 1863, as appears by Fawsett's testimony and that of Charles Karn. Karn says, the contract he was called to witness was in the summer of 1863, and Fawsett says, that is the contract alluded to in his testimony. That contract was, that Fawsett was to receive the same percentage that he got on the other roads he shipped over. McPherson agreed to see that he should have it. "That was the exact understanding." The shipments prior to this time had been paid for, and no drawbacks claimed or allowed until June, 1863. Fawsett says: "I talked to McPherson about it at different times, but we did not agree on a rate until June, 1863. I told him I was getting a rate from the Pennsylvania road and what it was, and he said he would give me the same."

That this related to future shipments there can be no doubt. Fawsett told McPherson what the Pennsylvania road was then paying, and he agreed to allow the same. Such language would not be used in regard to a past transaction, and if it is sought to apply it to such a transaction, then there was no consideration for the promise.

The contract should take effect from June, 1863. All allowances of drawbacks prior to that time, by the jury, were unauthorized, and to that extent the plaintiffs recovered more than they were entitled to recover.

For the reasons given the judgment is reversed and the cause remanded.

Judgment reversed.

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ROGERS v. WHEELER.

52 *New York*, 262.*Court of Appeals of New York; February Term,*
1873.

Carriers. Delivery of goods by connecting carrier to railroad. Where goods are shipped by water addressed to the owner at the ultimate destination, but the carrier by water is directed to deliver them at an intermediate point to carriers by rail, over whose railroad the goods must pass to reach their final destination, and the goods are received by such carriers by rail, with knowledge of these facts, the possession of the goods by such carriers is, *prima facie*, a possession as carriers, and they are responsible as such.

But, *it seems*, that in a case where, although such property was ultimately to be transported over the railroad, it was not to have been done immediately, but was to await orders from the owners, the possession of the carriers while thus awaiting directions would be that of warehousemen.

Appeal to the court of appeals of New York from the general term of the supreme court in the third judicial department.

This was an action by James Rogers and another to recover damages from William A. Wheeler and others, for the destruction by fire of certain wheat, owned by the plaintiffs and in possession of the defendants, who were operating a railroad as common carriers. The facts are stated in the opinion. Upon trial before a referee, he found that the wheat was, at the time of the fire, in the possession of the defendants as common carriers, and that they were liable for its value; and reported in favor of the plaintiffs accordingly. Judgment for the plaintiff was entered upon

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the report, from which the defendants appealed to the general term, which affirmed the judgment. From the judgment of the general term the defendants appealed to the court of appeals.

Richard C. James, for the appellants.

Samuel Hand, for the respondents.

GROVER, J.—The Northern Transportation company contracted to carry the wheat in question to Ogdensburgh, and deliver it to the consignee there as per the following margin: "J. & J. Rogers, Ausable Forks, N. Y.; care of D. C. Brown, Agent, Ogdensburgh." To give a correct construction to this margin, the extrinsic facts must be considered. From these it appears that the transportation company was a common carrier by water of grain, &c., from the lake ports to Ogdensburgh; some of which was to be delivered to the owners there, and some to be carried east upon the railroad operated by the defendants, and some by boats to Montreal; that the defendants were in possession of and operating a railroad as common carriers between Ogdensburgh and Rouse's Point, and had the possession of an elevator at the former place, into which the transportation company unloaded all the grain brought by it to Ogdensburgh, irrespective of its further destination; that D. C. Brown was the agent of the defendants at Ogdensburgh, and, as such, had entire charge of their transportation business at that place; that J. & J. Rogers, the plaintiffs, were partners, doing business at Ausable Forks, N. Y., as millers and flour dealers; that they had carried on this business for several years at the same place, and had, during this time, purchased grain at various ports upon the lakes, and had the same shipped from there by water to Ogdensburgh, and from there carried

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over the road operated by the defendant in 1864 to Rouse's Point, where it was taken by another carrier upon Lake Champlain and carried to another point upon the lake, where it was delivered to teamsters of the plaintiffs to be hauled to the mills at the Forks. Under these facts, the question is what was the legal effect of the direction in the margin, care of D. C. Brown, Agent, Ogdensburgh? Was it as contended by the plaintiffs, a direction to deliver to the defendants at that place, or, as claimed by the defendants, a direction to deliver to Brown as the agent of the plaintiffs? The determination of this question will dispose of a great number of the exceptions taken upon the trial. It should be further remarked that Brown was never in any respect the agent of the plaintiffs, unless so made by the clause in the margin in question. I think the extrinsic facts show that a delivery to the defendants was intended by the direction to deliver to Brown; in what character will hereafter be considered. He was at the time the agent of the defendants in the management of their transportation business. The wheat was to be carried by the defendants upon their road to Rouse's Point. This appears from the words "J. J. Rogers, Ausable Forks," and the fact that this was the way in which property was carried from Ogdensburg to the Forks. The name of "Brown, agent," was used instead of the names of the defendants; and the delivery to him as agent was as agent for the defendants—the only capacity in which he was acting at the time. Had Brown, at the time of the arrival of the wheat at Ogdensburg, ceased to act as agent for the defendants, and another was acting in that capacity, the transportation company would have been required to deliver the wheat to the latter. It was to the agent of the defendants in the transportation business that the wheat was to be delivered, and not to Brown as an

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individual. It appears that grain was received in the elevator by the defendants as warehousemen, where the owners resided at Ogdensburgh or its vicinity, as warehousemen and forwarders, in case it was to go down the river by boats, and as carriers when it was to be carried east over the railroad by them. They insist that the wheat in question was received by them as warehousemen; and that it was in their possession in that character at the time of its destruction by fire. If that be so the defendants are not liable, under the finding of the referee, for the loss, he having found the defendants free from negligence in respect to the fire. If their possession was as carriers they are liable, as the fire was not the result of the act of God. We have a case where property is shipped at lake ports upon boats, addressed "J. & J. Rogers, Ausable Forks," which the carriers are directed to deliver to the defendants at Ogdensburgh, who are carriers by rail from that place to Rouse's Point, over whose road the property must pass to reach its ultimate destination. Upon the receipt of this property by the defendants, with knowledge of these facts, can there be any doubt that it was received by them as carriers, in the absence of any proof of its being otherwise received? The receipt by a carrier of property, so marked as to show that it is to be carried over his route, in the absence of other evidence, shows that he received it for the purpose of such carriage by him. *Witbeck v. Holland*, 45 N. Y. 13. The evidence is conclusive that Brown knew that the wheat in question was to be carried over the road on its way to its ultimate destination at the Forks. When it was received by the defendants with this knowledge, in the absence of other proof, it must be assumed that they received it as carriers for this purpose. Its receipt by the defendants under these circumstances showed *prima facie* that their possession was as carriers, and that they were respon-

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sible as such. This shows that Brown was entirely mistaken in the assumption that he was agent for the plaintiffs, and received and had possession of the property as such, or had any right as such to direct or control in respect to storing the wheat at Ogdensburgh, or the time or manner of its transportation to Rouse's Point. It is conceded that the defendants are liable in case their possession was as carriers at the time of its destruction by fire. This having been *prima facie* proved, the inquiry is whether there were any facts proved that showed the possession to have been different. It is insisted by the counsel for the appellants that the evidence proved that although the wheat was ultimately to be carried to Rouse's Point by the defendants, that this was not to be done immediately, nor until orders to that effect were given by the plaintiffs, and that in the mean time the wheat was stored for them by the defendants. If this be true, the defendants were not in possession of the property as carriers. To make it such, they must have received it for immediate carriage in the due course of their business; and if so received, they were liable as carriers during the time it was detained by them for their own convenience, or otherwise, unless such detention was directed or sanctioned by the plaintiffs. Excluding the idea of Brown's agency for the plaintiffs, there was no proof any such direction or sanction by the plaintiffs. It is urged that such a direction or sanction should have been found by the referee from the custom of carrying grain over the road for the plaintiffs. It was proved by Brown that the plaintiffs usually bagged their wheat upon the cars at Rouse's Point, before it was put upon the boat, and that they could not bag more than one or two car-loads a day, and that for this reason but one or two car-loads of their wheat were sent in a day. One of the plaintiffs testified that they did bag their wheat at Rouse's

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Point, and preferred to do so, but that no instructions were ever given by the plaintiffs to the defendants to store or delay any of their wheat at Rouse's Point. That they received it as forwarded, and if it came as fast as they wanted to use it they were quiet, if not, they hurried up the defendants. That they could have received any quantity sent. Brown does not testify that any instructions were ever given by the plaintiffs in respect to the time when the wheat should be carried, or the quantity at any time, but he says he knew they put it in bags at Rouse's Point, and he forwarded it in quantities to accommodate them in this respect. This was the result of his own volition, uninfluenced by any suggestion from the plaintiffs. This does not show any direction by the plaintiffs for storing or retaining the wheat at Ogdensburgh. The defendants were at liberty to carry it all to Rouse's Point directly upon its receipt. The exceptions taken to the findings of fact by the referee are not tenable, as evidence was given tending to prove every fact so found. The exceptions to the refusal of the referee to find additional facts are not well taken. If the appellants deemed it necessary for the protection of their rights that the referee should pass upon additional questions of fact, they should have made a motion in the supreme court for an order sending back the report with instructions to the referee to add findings upon such questions. *Van Slyke v. Hyatt*, 46 *N. Y.* 259; *Lewis v. Palmer*, decided by this court at this term. The contracts sent by the agent of the transportation company for the carriage of the wheat by the defendants from Ogdensburgh to Rouse's Point were not competent evidence against the defendants. The evidence failed to show that he was authorized to make any such contracts for the defendants, or that they had any knowledge of their being sent. The referee, therefore, erred in receiving it. The counsel for the appel-

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lants insists that for this error the judgment must be reversed. He is right in this, unless the case show that the appellants could not have sustained any injury from such error. The present case does show this. Striking the incompetent evidence from the case, there is no view of the competent evidence that the referee would have been authorized to take that would have relieved the defendants from liability. This proved that the defendants received the wheat to be carried over their road in the usual course of business. There was nothing shown that would have justified a finding that their possession was other than as carriers. While so in their possession it was destroyed by an accidental fire. The competent testimony not only authorized but required a finding of these facts by the referee. The defendants could not, therefore, have been in any way injured by the reception of the incompetent evidence.

The counsel for the appellants cited *Barren v. Eldridge*, 100 *Mass.* 455, as showing that the possession of the defendants was as warehousemen and not as carriers. This case, as reported, has no bearing upon the character of the defendants' possession in the present case. From that it appears that the court having arrived at the conclusion that the property was not delivered for immediate transportation, but to be kept by the defendants awaiting future orders of the plaintiff directing further transportation, held that the possession of the defendants was that of warehousemen and not carriers. This legal conclusion from the facts was clearly right. But the counsel has, in addition to the report, produced the evidence in the case upon which the above facts were found by the court. From this it appears that the property was destroyed by the same fire that destroyed the grain in question in the present case. This has no bearing upon the character of the defendants' possession of this grain. I have ex-

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amined the evidence in that case, from which it appears that the corn and flour were delivered to the defendants to be kept until the plaintiff gave orders for its shipment. As to what was the character of the possession is not quite so clear. But the evidence upon which the court held that the defendants held this as warehousemen, and not as carriers, differs from that in the present case. Hence, if the court was right as to the grain in that case, it does not determine the question in this. The judgment appealed from must be affirmed, with costs.

All concurred.

Judgment affirmed.

CRAGIN v. THE NEW YORK CENTRAL RAIL-ROAD COMPANY.

51 *New York*, 61.

Commission of Appeals of New York; September Term, 1872.

Carriers. Animals. Special contracts. The rule that a railway company is responsible for the safe carriage and delivery of property intrusted to it as a common carrier, unless prevented by the act of God or the public enemy, does not apply in its full extent to the carriage of live stock. In the transportation of such stock, in the absence of negligence, the carrier is not liable for such injuries as occur in consequence of the vitality of the freight.

By the terms of a special contract by a railway company to transport a lot of hogs over its road, the shipper assumed the risk of injuries "in consequence of heat." *Held*, that as at common law a railway company, in transporting live stock, could be held liable only for

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negligence, effect could be given to the contract only by construing it as exempting the railroad company from liability for injuries from heat, the result of negligence. And therefore the company was not liable to an action for damages for the death of some of the hogs, the result of the negligence of its agents in not watering and cooling the hogs by wetting.

Appeal to the commission of appeals of New York from the general term of the supreme court in the first judicial district.

This was an action by George D. Cragin and others to recover damages from the New York Central Railroad Company for the death of certain hogs while in course of transportation by the defendant for the plaintiffs. Upon the trial it appeared that the hogs were transported under a written agreement between the parties, which provided, among other things, as follows :

"Now, in consideration that the said railroad company will transport such live stock at the reduced rate of eighty-five dollars per car load, the said Cragin & Co. hereby agree to take the risk of injuries which the animals or either of them may receive in consequence of any of them being wild, vicious, unruly, weak, escaping or maiming themselves or each other, or from delays, or in consequence of heat, suffocation, or other ill effects of being crowded, either upon the cars of the company, or on account of being injured by the burning of hay, straw, or any other material used by the drover for feeding the stock or otherwise, and from damage occasioned thereby, and also all risk, any loss or damage which may be sustained by reason of any delay in such transportation."

It also appeared that the hogs died from the effects of heat, in consequence of the negligence of the defendant's agents in not watering, wetting, and cooling off the hogs while being transported.

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The court charged the jury that if they were satisfied from the evidence that the defendant, through its agents, was guilty of negligence in the manner in which the hogs were transported, they should find for the plaintiffs.

The defendant excepted to the judge charging the jury that the defendant was liable for negligence in respect to any of the matters of which the plaintiffs were, by their contract, to take the risk; and requested the judge to charge that the plaintiffs having, by their contract, agreed to take the risk of injuries which the hogs might receive from delays, or in consequence of heat, suffocation, or other ill effects of being crowded upon the cars, the defendant was not responsible for such injuries, though the same may have arisen wholly or in part from the omission or negligence of the defendant's servants. The judge refused so to charge, and defendant excepted.

The jury found a verdict for the plaintiffs for the value of the hogs, with interest. Upon this verdict judgment was entered for the plaintiffs, and from the judgment the defendant appealed to the general term, which affirmed the judgment. The defendant appealed from the judgment of the general term to the commission of appeals.

Henry Nicoll, for the appellant.

John C. Dimmick, for the respondents.

EARL, Com.—The rule of the common law makes a common carrier responsible for the safe carriage and delivery of property intrusted to his care, unless he be prevented by the act of God or of the public enemy. But this rule is not applied in its full extent to the carriage of live stock. *Angell on Carriers*, § 214; *Clark v. Rochester, &c. R. R. Co.*, 14 N. Y. 570;

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Bissell v. New York Central R. R. Co., 25 *Id.* 442; Smith v. New Haven, &c. R. R. Co., 12 *Allen* (Mass.) 531. In the transportation of such stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Therefore in this case it was not sufficient to establish the common-law liability of the defendant to show that the hogs died from heat; but it was incumbent on the plaintiff to show further, that there was some negligence or omission of duty on the part of the defendant.

In this state it is well settled that a carrier may, by express contract, exempt himself from liability for damages resulting from any degree of negligence on the part of his servants, agents, and employees. *Lee v. Marsh*, 42 *Barb.* (N. Y.) 102; *Keeny v. Buffalo, &c. R. R. Co.*, 4 *Keyes* (N. Y.) 108; *Keeny v. Grand Trunk R. R. Co.*, 59 *Barb.* (N. Y.) 104; *Bissell v. New York Central R. R. Co.*, *supra*. In some of the states it is held that a carrier can not be exempted from responsibility for gross negligence. But so long as the freighter can insist that the carrier shall carry his property under the common-law responsibility, there can be no reason founded in justice, convenience, or public policy why he may not voluntarily enter into a contract founded upon sufficient consideration exempting the carrier from all responsibility for any degree of negligence, whether it be gross or slight.

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In this case the plaintiffs assumed and agreed to take the risk of injuries to the hogs in consequence of heat. Effect should be given to this stipulation. The parties must be held to have meant something by it. In consideration that the plaintiffs would assume and take certain risks, which would otherwise devolve upon the defendant, it agreed to carry at a reduced rate. If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on its part, then it gets nothing; for in such case, without the stipulation, it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which the hogs died from heat.

The judge at the trial, however, entirely ignored this special contract, and put the case to the jury upon the defendant's common-law responsibility, charging that it was liable if they found it guilty of negligence in the transportation of the hogs. And he refused to the defendant any benefit whatever from the special contract. In this I can not doubt the learned judge erred.

The judgment should, therefore, be reversed, and new trial granted, costs to abide event.

All concurred.

Judgment reversed.

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HAMILTON v. THE NEW YORK CENTRAL RAILROAD COMPANY.

51 New York, 100.

*Commission of Appeals of New York; September
Term, 1872.*

Carriers. Ejection of passenger. *It seems,* that a ticket purchased by a passenger from a railway company for passage between two designated points, which on its face purports to be good "only upon presentation of this ticket with checks attached," one of the two checks attached representing a passage over the company's own road, and the other a passage over a connecting railroad, entitles the passenger only to a single continuous passage over each road, without the right to stop at an intermediate station on either and resume the journey by another train. Even if such a right did exist, the passenger would lose it by voluntarily or negligently detaching the check, and thereby rendering himself unable to present the ticket in the form required by its terms.

In an action against a railway company for damages for ejecting a passenger from its train for non-payment of fare, evidence of a conversation between the plaintiff and the conductor of the defendant's train who had ejected the plaintiff, which occurred at another place than, and several hours after, the transaction itself, is not admissible as part of the *res gesta*, nor to show the *quo animo* of the conductor, the defendant being liable only for his acts within the scope of his authority. And even if such evidence is offered and received without objection from the defendant, it is error for the judge to refuse, when requested by the defendant, to instruct the jury that such evidence is not to be taken into consideration.

Appeal to the commission of appeals of New York from the general term of the supreme court in the fifth judicial district.

This was an action by Henry M. Hamilton to recover damages from the New York Central Railroad

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Company for being ejected from the defendant's cars. The facts upon which the questions discussed arose appear from the opinion.

Upon the trial the jury found a verdict in favor of the plaintiff. The defendant moved for a new trial upon exceptions taken, and also on the grounds of insufficient evidence and excessive damages. The judge denied the motion and at the same time, and in the order denying the new trial, made a further order as follows: "It is further ordered that the defendant may make a case and exceptions, covering the facts and testimony and exceptions upon the trial; and that upon the case so made, the whole and all of the facts and questions, arising on the trial and upon this motion, shall be heard in the first instance at general term;" and he directed that the proceedings of the plaintiff be stayed until the decision of the court upon the whole case.

The cause was subsequently heard on a case and exceptions prepared in pursuance of that order at general term. The general term ordered that the verdict rendered for the plaintiff at the trial be sustained, that a new trial of the cause be denied, and that judgment be rendered for the plaintiff pursuant to the verdict, together with costs. From the order of the general term, the defendant appealed to the commission of appeals.

D. M. K. Johnson, for the appellant.

J. R. Swan, Jr., for the respondent.

LOTT, Ch. Com.—The case was apparently heard at general term, under the order of the judge made at circuit, without objection by either party; and although that order may not have been strictly regular, it appears to have been treated as made within the

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provisions of section 265 of the Code so far as it related to the exceptions taken on the trial; and any irregularity affecting it must be deemed as waived.

The order at general term will, therefore, be assumed to have been made under that section of the Code, and is, consequently, reviewable by us on its merits. From such review the following conclusions have been reached by me:

First. The ticket purchased by the plaintiff at Buffalo entitled him, at any time within twenty days from its issue, to a single passage from Buffalo to Albany over the road of the New York Central Railroad Company, and then to a single passage from Albany to New York over the road of the Hudson River Railroad Company. The passage was to be continuous after it was commenced on each of the roads, without the right of stopping at any intermediate station and renewing the journey on a different train at any subsequent time during the twenty days. The exercise of such a right would have given the plaintiff the benefit of a new and different passage. A party leaving a train at a particular place on a certain day could not, after stopping at several other places, and laying over a day or more at each of them, be considered, fifteen days thereafter, as still on one and the same passage.

Each departure from a different place would constitute a new passage. This construction of the ticket was insisted on by the counsel of the defendant as one of the grounds of his motion for a nonsuit, and was also asked to be given in the instruction of the court to the jury. The refusal to grant the nonsuit and to comply with such request was erroneous.

Second. Assuming, however, that the plaintiff had the right to avail himself of the ticket on different trains from time to time, then he lost that right if he left the Central coupon in the spring at the head of

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his berth when he went off at Utica. By the terms of the ticket it was good only upon its presentation, with the checks attached, to the conductor. If, therefore, the holder voluntarily or negligently deprived himself of that right, or became unable in consequence of his own act or omission, to present the ticket in that form, he could not claim any privilege or right under it. There was a conflict in the evidence as to the circumstances under which the coupon in question was left in the sleeping car. The testimony of the plaintiff tended to show that it was given up by him on the demand of the conductor of the sleeping car on leaving the train at Utica; and he, on the other hand, swore that such was not the fact, but that he found it in the spring of the berth that had been occupied by the plaintiff.

Under this state of evidence the defendant's counsel asked the court to charge that if the jury believed that the plaintiff left his ticket in the sleeping car, the fact that he bought it in Buffalo, and there paid his fare to Albany, was no reason why he should not have been put off the second train when he would not produce his ticket or pay his fare. This was a proper request, and the refusal of the court so to charge was erroneous. The only evidence of such payment, which the conductor was authorized to receive, was the production of the ticket.

Third. It was proved that the fare paid by the plaintiff to the conductor of the Utica train (whose name was Morgan Gardner) was refunded by him at Albany; and the plaintiff testified that after he had received it he said to the conductor "this is not the end of the matter," and made some other observations; and that the conductor, in replying thereto, called him a nigger and a thief, and also used these words: "I don't doubt but if your pockets were searched we should find them full of counterfeit

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money." In reference to which the counsel of the defendant requested the court to charge the jury "that the conduct of Gardner at Albany after he had paid back the fare, if the jury believe Hamilton's statement in regard to it, is not to be taken into consideration, as the company is not responsible for the acts of Gardner at that time and under the circumstances. If he did slander or abuse Hamilton then and there, the company is not liable" This, the case states, "the judge refused to charge, unless qualified;" and the defendant's counsel then and there excepted. It did not appear what qualification the judge deemed necessary, nor has any been suggested in the prevailing opinion of the general term, nor by the plaintiff's counsel. The request was proper as made. What was said and done by Gardner at that time was not in the discharge of his duties as conductor. The company could, with equal propriety, have been made responsible for an assault and battery committed after the money was so refunded.

The fact that the statement referred to in the request was made without objection by the defendant, did not render the refusal proper. It is said with plausibility by MULLEN, J. (the judge who tried the cause and gave the prevailing opinion referred to), that the evidence "was conceded by both parties to be competent, as evidenced by the one by offering, by the other by not objecting to it. To instruct a jury that such evidence is not to be taken into consideration is to exclude it from the case. This the court had no right to do." The remark is specious and unsound. It does not follow that the omission to object to testimony is a concession that it is competent. Counsel may deem certain evidence offered entirely irrelevant and immaterial, and, therefore, harmless, and, for that reason, raise no objection to its introduction, and thus avoid an exception, assuming, as the learned

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judge, after making the remark above quoted, immediately added, that "being in, it was the duty of the court and jury to give it whatever effect it ought to have in the case."

On the application of that principle to the evidence referred to, the learned judge was asked to instruct the jury that it ought to have no effect whatever. This it was his duty to do if the testimony was irrelevant, and such as could legally have no influence whatever on their verdict.

It is claimed by the learned judge, however, that the evidence was competent, as a part of the *res gesta*, to show the *quo animo* of the agent in the transaction, beginning at St. Johnsville, and ending at Albany. The difficulty with that proposition is that the transaction which constituted the gravamen of the action was the ejection of the plaintiff from the car of the defendant; and that terminated at St. Johnsville, and not at Albany. The claim that what occurred at Albany several hours after such termination was, nevertheless, a part of the transaction, is refuted by the mere statement of the proposition. It might be added that the defendant was only liable for what was done by the conductor within the scope of the authority conferred on him in the discharge of his duty. It is conceded by the learned judge that it could not be charged with the agent's slanders; and he erred in holding that it could be held responsible for the *quo animo* of his action beyond the purpose of ejecting the plaintiff.

Assuming the views above presented to be correct, I deem it unnecessary to consider the other exceptions which were taken on the trial.

All of my brethren concur with me in what has been said on the third and last ground or question considered by me, but express no opinion on the other two questions. It follows that the order denying a new trial was, on that ground erroneous; and the

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order must, therefore, be reversed, and a new trial must be ordered, costs to abide the event.

All concurred in the result.

Order accordingly.

McCORMICK v. THE PENNSYLVANIA CENTRAL
RAILROAD COMPANY.

49 *New York*, 303.

Court of Appeals of New York; April Term, 1872.

Actions. Appearance. Jurisdiction. If a court of one state has jurisdiction of the subject-matter of an action against a railroad company, incorporated under the laws of another state, jurisdiction of the person may be conferred by consent; and the consent may be expressed by the corporation appearing by attorney and answering generally in the action.

Carriers. Baggage. The plaintiff, intending to take passage by the defendant's railroad, presented his baggage to be checked by defendant's baggage-master, but, in compliance with defendants' rules, the baggage-master refused to check it until plaintiff had procured passage tickets. During the absence of plaintiff for the purpose of procuring the tickets, the baggage-master caused the baggage to be placed in the baggage car. When plaintiff returned with his tickets, the baggage-master refused to give checks for the baggage unless extra compensation was paid, for the reason that its weight exceeded what was allowed to pass free with the number of tickets purchased by plaintiff. Plaintiff refused to pay, and demanded the checks or his baggage, which was refused; the baggage being so covered by other freight that it could not be reached and removed before the time for starting the train. Plaintiff refused to go upon that train, and his baggage went forward to his

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destination, where, not being claimed, it was stored by the defendant, and the succeeding night was destroyed by fire. *Held*, that the defendant did not sustain the relation to the plaintiff of a carrier of him and his goods, and could not avail itself of any of the rules as to the liabilities of common carriers of passengers and their baggage.

Query, whether, as matter of law, there was a conversion of the plaintiff's trunks by the defendant?

It seems, that the question whether the reason given for not delivering the trunks to plaintiff was such a qualification of the refusal to deliver as would rebut the evidence of conversion, is a question of fact for the jury.

It seems, that the acts of the baggage-master were within the scope of his authority, and the defendant was liable therefor.

Appeal to the court of appeals of New York from the general term of the supreme court in the first judicial department.

This was an action by Cyrus H. McCormick against the Pennsylvania Central Railroad Company to recover damages for the conversion of the plaintiff's baggage.

The plaintiff, intending to travel with his wife from Philadelphia to Chicago, offered the baggage in question to the defendant's baggage-master at Philadelphia, to be checked to Chicago. The baggage-master, in pursuance of a regulation of the defendant that passengers should procure and exhibit tickets for passage before having their baggage checked, demanded passage tickets as a condition of checking the plaintiff's baggage. The plaintiff left for the purpose of procuring the tickets, and in his absence the baggage-master caused his baggage to be placed in the defendant's baggage car. On the plaintiff's return with his tickets, the baggage-master refused to give checks for the baggage without extra compensation on account of its excess of weight. The plaintiff refused to pay such extra compensation, and demanded his baggage

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or the checks therefor. The baggage-master refused to deliver either, assigning as a reason for the refusal to deliver the baggage that it was covered by other baggage, and could not be removed before the time for starting the train. The plaintiff refused to go upon that train. He procured from the defendant's president an order to the defendant's baggage-master at Pittsburg to deliver the baggage without checks, and a telegram was sent to stop the baggage there. This order plaintiff delivered, upon his arrival at Pittsburg, to the agent of defendant, named Richardson, and was informed that the telegram was received, but that for lack of time the baggage had not been stopped. The baggage was carried to Chicago, and, no one being there to receive it, was stored in the usual place for unclaimed baggage. During the night succeeding its arrival it was destroyed by fire.

Other facts in the case and questions presented appear in the opinion.

The court directed the jury to find a verdict for plaintiff, submitting to them simply the question of damages. The jury rendered a verdict for plaintiff for ten thousand six hundred and sixty dollars and sixty-one cents. A motion by the defendant for a new trial was denied, and judgment entered upon the verdict. The defendant appealed from the judgment and the order denying a new trial to the general term, which affirmed both; and from this judgment the defendant appealed to the court of appeals.

Charles M. Da Costa, and *Ira Shafer*, for the appellant.

Residence when once established is presumed to continue until a change is proven. 2 *Kent Comm.* 431, and cases cited; *Crawford v. Wilson*, 4 *Barb.* (N. Y.) 504; *Jennison v. Hapgood*, 10 *Fick.* (Mass.) 77.

The question of jurisdiction was not waived by

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defendant appearing and answering. *Cumberland Coal Co. v. Sherman*, 8 *Abb. (N. Y.) Pr.* 243; *Harriott v. New Jersey R. R., &c. Co.*, 2 *Hilt. (N. Y.)* 262; *Jones v. Norwich, &c. Trans. Co.*, 50 *Barb. (N. Y.)* 193.

The defendant being a common carrier, an appropriation of the goods to its own use must be shown to sustain action. *Whitney v. Wilson*, 30 *Barb. (N. Y.)* 276; *Tolano v. National Steam Nav. Co.*, 5 *Robt. (N. Y.)* 318; *Devereaux v. Barclay*, 2 *Barn. & Ald.* 702; *Stevenson v. Hart*, 4 *Bing.* 476; *Nelson v. Whitmore*, 1 *Rich. (S. C.)* 323.

The demand and refusal were not conclusive proof of conversion, but only evidence tending to show the conversion. *Rook v. Midland R. R. Co.*, 14 *Eng. Law & Eq.* 178; *Wild v. Walters*, 32 *Id.* 422; *Kelsey v. Griswold*, 6 *Barb. (N. Y.)* 443; *Andrews v. Shattuck*, 32 *Id.* 397; *Dunlap v. Hunting*, 2 *Denio (N. Y.)* 643; *Johnson v. Couillard*, 4 *Allen (Mass.)* 446; *Robinson v. Burleigh*, 5 *N. H.* 225, 228; *Ludley v. Downing*, 2 *Carter (Ind.)* 419; *Nelson v. Whitmore*, *supra*. Where a qualification is attached to a refusal, the question is whether such qualification be a reasonable one or not. *Ganton v. Nurse*, 2 *Brod. & B.* 447; *Fouldes v. Willoughby*, 8 *Mes. & W.* 540; *Hayward v. Seaward*, 1 *Moore & S.* 459; *Wilde v. Waters*, 32 *Eng. Law & Eq.* 422; *Deert v. Childs*, 5 *Stew. & P. (Ala.)* 383; *St. John v. O'Connell*, 7 *Port. (Ala.)* 466; *Mount v. Derrick* 5 *Hill. (N. Y.)* 456; *Thompson v. Sixpenny Savings Bank*, 5 *Bosw. (N. Y.)* 311; *McEntee v. New Jersey Steamboat Co.*, 45 *N. Y.* 34. Whether the refusal under the circumstances constituted conversion or not, was a question of fact for the jury. *Lockwood v. Bull*, 1 *Cow. (N. Y.)* 330, 333; *Jessup v. Miller*, 1 *Keyes (N. Y.)* 329; *Thompson v. Sixpenny Savings Bank*, 5 *Bosw. (N. Y.)* 311, and cases there referred to; *Watt v. Potter*, 2 *Mas.* 80.

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Conversion is waived by any subsequent acts inconsistent with it or ratifying the wrongful act. *Wells v. Kelsey*, 15 *Abb. (N. Y.) Pr.* 53; *Ball v. Liney*, 44 *Barb. (N. Y.)* 504, 514, 515; *Brewer v. Gregory*, 2 *Barn. & C.* 310; *Lythgoe v. Vernon*, 5 *Hurl. & N.* 179; *Rotch v. Howes*, 12 *Pick. (Mass.)* 139; *Hewes v. Parkman*, 20 *Id.* 90; *Firemen's Ins. Co. v. Cochran*, 27 *Ala.* 228; *Bell v. Cummings*, 3 *Sneed (Tenn.)* 286. Whether the facts constitute a waiver, is a question for the jury. *Lucas v. Trumbull*, 15 *Gray (Mass.)* 309.

Defendant had a right to make reasonable rules in reference to transportation. *Hibbard v. New York, &c. R. Co.*, 15 *N. Y.* 455; *Commonwealth v. Powers*, 7 *Metc. (Mass.)* 596. If the conduct of defendant's agent was not justified by the rules, defendant is not liable. *Hibbard v. New York, &c. R. Co.*, 15 *N. Y.* 455.

A common carrier is not responsible beyond the limits of his own line, except by special contract. *Van Santvoord v. St. Johns*, 6 *Hill (N. Y.)* 157; *McDonald v. Western R. R. Co.*, 34 *N. Y.* 497; *Root v. Great Western R. R. Co.*, 45 *Id.* 524, 529, 530; *Maghee v. Camden, &c. R. R. Co.*, *Id.* 514, 518; *Northern R. R. Co. v. Fitchburg R. R. Co.*, 6 *Allen (Mass.)* 254; *Notting v. Connecticut R. R. Co.*, 1 *Gray (Mass.)* 502; *Pendergrast v. Adams Exp. Co.*, 101 *Mass.* 120; *Elmore v. Naugatuck R. R. Co.*, 23 *Conn.* 473; *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 *Id.* 468; *Jenneson v. Camden, &c. R. R. Co.*, 4 *Am. Law Reg.* 234; *Rome R. R. Co. v. Sullivan*, 25 *Ga.* 228; *Withers v. Macon, &c. R. R. Co.*, 35 *Id.* 273; *Fowles v. Great Western R. R. Co.*, 16 *Eng. Law & Eq.* 531.

The contract must be governed by the law of Pennsylvania. *Schwartzemberger v. Pennsylvania R. R. Co.*, 45 *Pa.* 208.

On the arrival of the trunks at Chicago, defendant

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became mere warehousemen, and were not liable for the destruction of the trunks by fire. *Fisk v. Newton*, 1 *Denio* (N. Y.) 45; *Rowland v. Milne*, 2 *Hill*. (N. Y.) 150; *Goold v. Chapin*, 20 *N. Y.* 259; *Roth v. Buffalo, &c. R. R. Co.*, 34 *Id.* 548; *Thomas v. Boston, &c. R. R. Co.*, 10 *Metc.* (Mass.) 472; *Norway Plains Co. v. Boston, &c. R. R. Co.*, 1 *Gray* (Mass.) 263; *Cincinnati, &c. R. R. Co. v. McCool*, 26 *Ind.* 140.

The allowance of interest was a matter of discretion with the jury. *Black v. Camden, &c. R. R. Co.*, 45 *Barb.* (N. Y.) 40; *Walrath v. Redfield*, 18 *N. Y.* 547; *Matthews v. Menadger*, 2 *McLean*, 145; *Lincoln v. Claffin*, 7 *Wall.* 132.

What is reasonable baggage, is a question of fact for the jury. *Rawson v. Pennsylvania R. R. Co.*, 2 *Abb.* (N. Y.) *Pr. N. S.* 220; *Merrill v. Grinnell*, 30 *N. Y.* 594.

The declarations of Richardson were no part of the *res gestæ*, and were inadmissible. *Greenleaf on Evid.* § 113; *Story on Agency*, § 134; *Pennsylvania R. R. Co. v. Buck*, 57 *Pa.* 339; *Pratt v. Ogdensburgh, &c. R. R. Co.*, 102 *Mass.* 557.

The wife alone could sue for her separate property. *Rawson v. Pennsylvania R. R. Co.*, 2 *Abb.* (N. Y.) *Pr. N. S.* 221. The exceptive words, "from any person other than her husband" apply only in cases where the rights of creditors are involved. *Lockwood v. Cullen*, 4 *Robt.* (N. Y.) 133; *Wilbur v. Friedenburgh*, 52 *Barb.* (N. Y.) 478; *Jaycox v. Caldwell*, 37 *How.* (N. Y.) *Pr.* 247; *Kelly v. Campbell*, 38 *N. Y.* 29. The rule is the same under the laws of Illinois. *Manny v. Recksford*, 44 *Ill.* 129; *Sweeny v. Danrom*, 47 *Id.* 450, 455

E. M. Stoughton, and *Samuel Hand*, for the respondent.

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FOLGER, J.—*First*. Had the court below jurisdiction of the action and of the parties, so that it could render the judgment appealed from?

We will assume that the plaintiff was at no time a resident of this state, and that the learned justice at circuit erred in ruling, that as a fact established he was a resident. We do not, however, determine those questions, as we can otherwise dispose of the defendant's objection of want of jurisdiction.

The cause of action was of that nature, that although it arose in another state, the court below had jurisdiction of the subject-matter of the action. In this respect the case differs from *Harriott v. New Jersey R. R., &c. Co.*, 2 *Hill*. (N. Y.) 262, cited to us by the defendant. There the court of common pleas of the city and county of New York had no jurisdiction of the subject-matter, being confined by the Code, § 33, in such case, to a cause of action arising in this state.

The defendant in the case at bar employed attorneys who, as officers of the court, served notice of the defendant's appearance, and put in and served an answer generally in the action, and raised no objection until after issue was joined and the trial commenced, that the court had not jurisdiction of the action and of the parties. In this respect the case differs from *Cumberland Coal Co. v. Sherman*, 8 *Abb*. (N. Y.) *Pr.* 243, where the foreign corporation defendant appeared specially, and only for the purpose of moving to set aside the summons, &c., for the want of jurisdiction over it. *Jones v. Norwich, &c. Trans. Co.*, 50 *Barb*. (N. Y.) 193, does hold that the objection may be made after answer, and even on appeal after judgment. Such holding was not necessary to the decision of that case, as jurisdiction was there retained by virtue of a statute other than the Code of Procedure. Nor do we agree in the *dictum* there expressed. We hold that

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where the court has the jurisdiction of the subject-matter or cause of action, that consent may confer jurisdiction of the person; and that such consent may be expressed by a foreign corporation, by appearing by attorney and answering generally in the action. Though it seems to have been thought that a foreign corporation could not at common law have been sued here, it was at the same time suggested that it would be competent for it to constitute an attorney to appear and plead in an action. *McQueen v. Middletown Manuf. Co.*, 16 *Johns. (N. Y.)* 5. Since that time it has been so often held that a voluntary appearance confers jurisdiction of the person, and the rule seems so reasonable in itself, that we have no hesitation in adopting it. In *Faulkner v. Delaware, &c. Canal Co.*, 1 *Denio (N. Y.)* 441, BEARDSLEY, J., after quoting TANEY, Ch. J., to the effect that a corporation, though it must live and have its being in the state of its creation, yet it may be recognized and contract in another, says: "hence it may prosecute and defend suits out of the state in which it was created." And see *Paulding v. Hudson Manuf. Co.*, 2 *E. D. Smith (N. Y.)* 38; *Watson v. Cabot Bank*, 5 *Sandf. (N. Y.)* 423, the judgment in which was affirmed in this court, 4 *Duer (N. Y.)* 606, note; *Dart v. Farmers' Bank*, 27 *Barb. (N. Y.)* 337.

Second. Was there a conversion of the property by the defendant so as to warrant this action?

The defendant claims that there is no conversion unless there was an appropriation of the goods to its own use, and puts it in part upon the ground that the defendant was a common carrier. In the first place, the defendant does not in this action hold the place of a common carrier of plaintiff and his goods. If there is cause of action, as at present before us, it is because the plaintiff would not consent to take on with the defendant the relation of passenger with his baggage.

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He refused to do so, and demanded return to him of his goods. His trunks and their contents were then no longer to be treated in the transaction as baggage of a passenger in the hands of the defendant as a common carrier of him and them, but as property of one in the possession of another, delivery of which to the owner had been demanded and been refused. Again, a common carrier is not always excused in an action for conversion, because he has not in fact applied to his own use the goods committed to him in his public capacity. *Dewell v. Moxon*, 1 *Taunt.* 391; *Anon.*, 2 *Salk.* 655. It is doubtless correct to say as a general proposition, that demand and refusal are not conclusive evidence of conversion. There may be such a state of facts shown in opposition as fully to rebut. But such may be the case also, as that demand and refusal shall be enough. If one have the power to deliver or to retain the article demanded, a demand and a refusal to deliver is sufficient evidence of a conversion. *Bristol v. Burt*, 7 *Johns.* (N. Y.) 254. A refusal, however, may be accompanied with such reasonable qualification as to furnish an excuse for retention, and then there is no conversion shown merely by proof of demand and refusal. *McEntee v. New Jersey Steamboat Co.*, 45 *N. Y.* 34. In the case before us, the qualification was, that the prearranged moment for the starting of this fast express through passenger train was so right upon the defendant, that to take the measures needed to get at in the baggage crate the trunks of the plaintiff, and removing them therefrom, to put them again in his possession, would take so long as to derange the time table, insure delay, and incur the hazard of accident and damage. As to this, the business of the defendant as a common carrier of persons is an element in the case. We are not prepared to say that, under the usual circumstances of one taking passage with ordinary baggage, and at the last moment for his own

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convenience changing his purpose, it would not be a good excuse for a refusal to deliver it, so as to repel the conclusion of a conversion of the goods, that the delay needed therefor would throw out of gear the arrangements for the running of the train, and thus risk be incurred to the passengers and property carried. There would be, to be sure, the physical power to delay the train and to overhaul the baggage and to find and deliver to him his own. But there would be, on the other hand, the duty to others of heeding all salutary and necessary arrangements for a safe journey for them. Does not the presence of this fact in any case, presenting the duty of a railroad company to be thoughtful of the safety of the passengers under its care, put a weighty consideration in the scale over against the evidence of conversion of baggage furnished by the simple fact of a demand and refusal to deliver it?

There is, however, an important circumstance in this case, which is to be borne in mind in the consideration of this question. It was one of the regulations of the defendant that no baggage should be checked until the passenger tendering it should have bought his ticket. On the plaintiff offering his trunks for checks, he was required by the baggage-man, in obedience to this rule, to first provide his tickets. During his absence for them, the baggage-man weighed the trunks, put checks upon them, and placed them in the baggage crate, and upon the top of them was placed other baggage. After this was done the plaintiff returned with his tickets. The baggage agent then enforced upon the plaintiff another rule of the defendant. Inasmuch as the weight of the trunks was apparently more than the number of tickets bought would entitle the passengers going under them to carry as ordinary baggage, there was demanded of the plaintiff payment of a charge for the excess. It was

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the enforcement of this rule that caused the plaintiff to yield his purpose of travel by that train and to demand possession of his baggage again. Had the baggage-man adhered to the rule not to check and load baggage until tickets were bought, a rule of which he had demanded observance from the plaintiff, the trunks might have been beside the car, and surrender of possession to the plaintiff would have been easy. Had the man in the first instance, before requiring the purchase of tickets, asked for the extra charge for overweight, and had the plaintiff declined, then return to him of his property could have been easily made. No doubt but that the defendant had the right to neglect observance of any or all of these rules, they being made for its convenience and protection. But it had no right to first enforce one upon the plaintiff and then itself disregard it, and inflict the inconvenient result of vacillation upon him. It insisted that he should act up to it. While he was so doing, it neglected it, and in that neglect so placed his baggage, as that when it came to demand of him the observance of another rule of which he had not been theretofore notified, and he refused and demanded his property, the practical difficulty arose of the inability to meet the changed aspect of affairs.

It does not appear but that he would have refused to pay the extra charge had it been made before he was sent to procure his tickets, and thus his trunks never have gone out of reach. It is said that the baggage-master could not know that there was an excess of baggage until the number of tickets was apparent to him. He did know, however, that apparently there was but one passenger with his wife, to whom it belonged, and if there was to be, on his part, an enforcement of all the rules of the company before the plaintiff was to be allowed to take his place as passenger carrying his trunks with him, it was this agent's duty

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to keep matters in such a state as that it should be possible to meet the contingency of a refusal on the part of the plaintiff to comply and of the consequent necessity of surrendering to him his property. This deviation by the defendant from the rule which the plaintiff was obeying, may have been the cause of the inability of the defendant to comply with his demand for the delivery of his property.

Again: the plaintiff, after payment of the charge for extra baggage was required of him, first demanded the checks for his trunks; and it was not until the refusal of them that he made demand for the delivery of the trunks themselves. So that the defendant had the option of giving the checks or giving the trunks; and if the circumstances which it had brought about made the latter impracticable, the former might have been done. Thus there is another element in the inquiry as to the reasonableness of the excuse. And was, then, that inability stated as an excuse for not making delivery a reasonable qualification of the refusal so to do?

It is not for the court, in this case, to pass upon this as a question of law, whether there was or was not a conversion. Whether or not the qualification of the refusal to deliver was reasonable in this case, is a question of fact for the consideration of the jury under proper instructions from the judge. *Mount v. Derick*, 5 *Hill* (N. Y.) 455; *Watt v. Potter*, 2 *Mas.* 80; *Alexander v. Southey*, 5 *Barn. & Ald.* 247; *Delano v. Curtis*, 7 *Allen* (Mass.) 470.

And in this view the testimony in the case, as to an arrangement between the plaintiff and Thompson, the president of the defendant, for the retention and delivery of the trunks to the plaintiff at Pittsburgh, and what took place between the plaintiff and the defendant's agent at Pittsburgh as to the trunks having passed on to Chicago, and the arrangement for him to

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receive them there, was proper to have been submitted to the jury as bearing on the question of a conversion. *Hayward v. Seward*, 1 *Moore & S.* 459. The defendant is understood to claim that this testimony tended to show what should be termed a waiver (*Lucas v. Trumbull*, 15 *Gray (Mass.)* 396; *Trayner v. Johnson*, 1 *Head (Tenn.)* 51); or a ratification of the act of the defendant in sending forward the baggage (*Hewes v. Parkman*, 20 *Pick. (Mass.)* 90; or an affirmation of the act, and a treating the defendant as the agent of the plaintiff in doing it (*Brewer v. Sparrow*, 7 *Barn. & C.* 310); or as a satisfaction for the wrongful act (*Id.*; *Lythgoe v. Vernon*, 5 *Hurl. & N.* 179); or as testimony tending to rebut the evidence of conversion furnished by the demand and refusal, and so going to show that there was no conversion by the defendant to its own use of the property of the plaintiff.

As the authorities are in this state, the last is the better view of it. See *Hanmer v. Wilsey*, 17 *Wend. (N. Y.)* 91; *Otis v. Jones*, 21 *Id.* 394; which hold that a mere tender will not bar a tort, nor take away a right to a full compensation in damages; and *Reynolds v. Shuler*, 5 *Cow. (N. Y.)* 323, where it is laid down that trover lies for the conversion of a chattel, though it be restored before suit brought, the restoration going only in mitigation of damages.

The testimony should have been submitted to the jury on the issue of a conversion. And see *Carver v. Nichols*, 10 *Gray (Mass.)* 369; 7 *Allen (Mass.) supra.*

And the learned justice erred at the circuit in taking these questions from the jury, and passing upon them as matters of law for his determination. It follows that there must be a new trial.

There are some questions made in the case which it may be well to pass upon now, to facilitate another trial if one should be had.

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First. We think that the defendant is liable for the acts of the baggage-man at its depot at Philadelphia, though that act should be held wrongful. He was acting within the scope of his authority in requiring checks for the baggage, and in demanding payment of the charge for extra baggage, and in putting it into the car before payment thereof, and in refusing delivery of it for the reason given by him. This makes the defendant responsible for his act. *Higgins v. Water-vliet Turnpike & R. R. Co.*, 46 *N. Y.* 23.

Second. We do not think that the defendant can avail itself in this action of any of the rules which it invoked which have been laid down as to the liability of common carriers. As before remarked, the cause of action, if any, does not arise from any fixed relation of the plaintiff to the defendant, as a passenger with his baggage carried or to be carried by it. He expressly arrested the commencement of that relation and refused to enter into it, and for the express purpose of preventing it, demanded back his baggage. From that moment the defendant, if this action is maintainable at all, did not hold his trunks as common carriers of him and them, but as wrong-doers, tortiously detaining them and converting them to its own use.

Third. The plaintiff, if he maintains his case, this being an action of trover, will be entitled to interest from the time of the conversion. *Hyde v. Stone*, 7 *Wend. (N. Y.)* 354. In the action of trover, interest is as necessary a part of a complete indemnity as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value. *Andrews v. Durant*, 18 *N. Y.* 496.

Fourth. The memoranda received in evidence were not original entries; they were copies of originals. A copy of an entry made by himself or by any other person, may be used by a witness to refresh recollection

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(*Marchy v. Shultz*, 29 *N. Y.* 346), and the original memorandum may be read in evidence, if made at or near the time when a material fact to which it relates occurred, and the witness producing it can swear that it was made correctly, though he can not then recollect the facts contained in it. *Halsey v. Sinsabaugh*, 15 *N. Y.* 485. But a copy of a memorandum can not be read as evidence of the contents of it. 29 *N. Y. supra.* Though the testimony, as given in the appeal-book, is confused as to the various memoranda produced on the trial, it is evident that the memoranda first made by the plaintiff and those helping him were destroyed, and that the papers exhibited to the witnesses were prepared from them; but it does not appear that they were literally copies. It seems that in preparing the lists of articles in the different lost trunks, the memories of those engaged, principally that of the wife of the plaintiff, were set at work, and as articles were brought to recollection from the bills of the purchase of them and otherwise, they were set down upon paper; different pieces of paper it would appear. When this process was completed, the contents of those papers were transcribed in gross. These were the completed and corrected memoranda, and substantially the original memoranda. It was as to these that the plaintiff's wife testified, that she knew all the articles named in them were in the trunks. We do not understand that the memoranda were read to the jury as evidence of themselves of what were the contents of the lost trunks, but only as a statement on paper in detail, of what this witness had testified were the articles contained in the trunks. In this view the memoranda were competent.

Fifth. The testimony as to the declarations of Richardson or other person, an agent of the defendant at Pittsburg, was objected to as not accompanying any act of his as such agent. But this is a mistake of fact.

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The plaintiff presented to him an order for the trunks, which was addressed to Richardson, and it was in answer to this order and excusing himself from compliance with it that he made the statement testified to. It was in the performance of his duty as agent and as part of the *res gestæ*. It was not error to admit the statement.

Sixth. The objection to the testimony upon the value of the brooch, given by the wife of the plaintiff, and the testimony as to value, given by Miss Merrick, that they were not shown to be qualified to speak as to value, was well taken. The foundation had not been laid by any proof of the knowledge of the witnesses upon the subject. The value of the articles was sufficiently shown by other testimony, so that the defendant was not, perhaps, injured by this testimony, and we should not feel called upon to regard the admission of it as fatal, were it the only point taken.

Seventh. A question of some importance, is that raised by the objection to proof as to the necklace and other personal ornaments of the plaintiff's wife; and by the request to charge that the plaintiff could not recover in this action for them, or for her wearing apparel.

It appeared that the plaintiff and his wife were married in 1858, in Illinois, and that the diamonds, jewelry, and ornaments were presents made there by the husband to the wife, and that the wearing apparel was bought for her after marriage, for her especial use, by the husband or with his money. It is claimed that all these are her own property, which the plaintiff can not control; and that for a conversion of it he can not maintain an action. This action was commenced in 1867, but the alleged conversion was in March, 1862.

In the absence of statutes, varying the law, chattels of this kind, got for the use of the wife,

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would be deemed her paraphernalia. 2 *Blacks. Com.* 435.

As such they were subject to the control of the husband during his lifetime, and he alone could sue for an injury to, or a conversion of them. The defendant claims that this character of them has been changed by statute. It relies upon the statute of Illinois, passed February 21, 1861, and which was given in evidence on the trial. That act was passed after the marriage of the plaintiff, and so far as appears, after the purchase of all the chattels in question. It enacts that the property of any married woman, belonging to her as her sole and separate property, shall remain such. But these chattels were not then the sole and separate property of Mrs. McCormick. The statute further enacts that the property which any married woman acquires during coverture, in good faith from any person other than her husband, shall be and remain her sole and separate property. But this property was not thus acquired by her after her marriage. As this property was all bought and put into the possession of the wife before she was a resident of this state and while she was a resident of Illinois, we must rest upon the law of that state, as it is shown to us to be, by the production in evidence of the statute above referred to. In this view, *Rawson v. Pennsylvania R. R. Co.*, lately decided by the commission of appeals and cited to us by the appellant, is not in point; as that rests entirely upon the statute law of this state. We see no reason why the plaintiff is not entitled to sue for an injury to or a conversion of this property claimed by the defendant to belong to his wife as her sole and separate property.

But for the error in not submitting to the jury the question of whether there was a conversion of the property by the defendant, as affected by the reasonableness of the excuse made for not delivering it on

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the plaintiff's demand, the judgment appealed from should be reversed and a new trial ordered, with costs to abide the event of the action.

All concurred upon questions discussed, save on question of conversion.

ALLEN, J., concurred with above opinion.

CHURCH, Ch. J., and RAPALLO, J., were of opinion that, as matter of law, there was no conversion.

GROVER and PECKHAM, JJ., were of opinion that, as matter of law, there was a conversion; and they dissented from the result.

Judgment reversed.

STONEMAN v. THE ERIE RAILWAY COMPANY.

52 *New York*, 429.

Court of Appeals of New York; April Term, 1873.

Carriers. Baggage. Married women. An action may be maintained by a married woman in her own name against a railway company, for injury to her baggage while in charge of the railway company as a common carrier, if such baggage is her separate property under the laws of the state in which she is domiciled, and the laws of the state in which the action is brought permit a married woman to sue when the action concerns her separate property. The *lex loci* does not govern as to her right to the property, but only as to the remedy.

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Where a railway company demands and receives from a passenger, besides the fare or passage-money, additional compensation as freight for the carriage of packages containing merchandise as well as the personal baggage of the passenger, and there is no evidence of fraud or concealment on the part of the passenger in regard to the contents of the packages, the railway company is liable as a common carrier for any injury to the merchandise as well as to the baggage.

Appeal to the court of appeals of New York from the general term of the superior court of the city of Buffalo.

This was an action by Mary O. H. Stoneman to recover damages from the Erie Railway Company for the loss of three packages and their contents while in course of transportation over the defendant's railway. The plaintiff (a married woman) was at the time a passenger upon the railway, but the packages contained articles of merchandise, besides her personal baggage. Other facts are stated in the opinion. Upon trial by the court, the judge found that the plaintiff was entitled to recover for all the property destroyed, and judgment for the plaintiff was entered accordingly. The defendant appealed to the general term, by which the judgment was affirmed. From the judgment of the general term, the defendant appealed to the court of appeals.

John Ganson, for the appellant.

Delavan F. Clark, for the respondent.

PECKHAM, J.—From the facts found by the judge at the trial, it appears that the articles for which this action is brought were chiefly owned by the plaintiff prior to her marriage in 1861, or were the proceeds of that property, except the presents made to plaintiff at

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the time of her marriage and prior thereto, or possibly some of it (how much, if any, except the rattle and cup, does not appear) afterward.

It further appears that, at and from the time of said marriage to the trial, the state of Maryland had been the matrimonial domicile of the plaintiff, and that, by the laws of that state at and since the marriage, a married woman in that state holds the personal property which belonged to her at her marriage or acquired or received by her after marriage, as *feme sole*, and to her separate use.

It was held to have been the law of Maryland, prior to the adoption of their Code, that when property is given to a *feme covert* to her separate use simply, without restraining her power of disposing of it or prescribing the mode in which that power is to be exercised, she may act in the disposition of it as if she were a *feme sole*; in fact, the statute did not apply to such cases. *Buchanan v. Turner*, 26 *Md.* 1.

Such was the condition of this property, with a trifling exception, as to which no separate question was raised.

But by the Code of Maryland, adopted in 1860 and prior to plaintiff's marriage, "the property, real and personal, belonging to her at her marriage or acquired or received thereafter by purchase, gift," &c., "she shall hold for her separate use, with power of devising the same as fully as if she were a *feme sole*."

If not devised, the husband takes a certain share or all of the personal property, depending upon whether she leaves children or not, and the title shall vest in him accordingly. *Md. Code*, p. 345, art. 45, §§ 1, 2. She is also authorized by that Code to sue for the recovery, security, or protection of her property, as fully as if she were a *feme sole*. See § 4; *Buchanan v. Turner*, *supra*. The cases cited by appellant's

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counsel from 12 and 19 *Maryland Reports* do not apply to the Code as enacted in 1860.

The counsel insists that plaintiff can not have the benefit of our statutes in this state for protecting the rights of women "married in this state." *N. Y. Laws of 1860*, p. 157, § 1. But the plaintiff does not rely upon those statutes for her right, for her title to the property; but she comes here merely for a remedy; as to that, she is governed by the *lex loci*, and she must sue in the mode and form prescribed by our laws. *Story Confl. Laws*, § 556. She clearly had sufficient title in the goods lost to bring the action in her own name under our Code. They were her "separate property," within the meaning of that statute. *N. Y. Code of Pro.* § 114.

The other question in the case is whether the plaintiff was entitled to recover for anything beyond her legitimate personal baggage. The court at the trial held that the baggage was limited to the articles designated as the plaintiff's wardrobe, and that the other articles were merchandise and not personal baggage; but the recovery was had upon the ground that its transportation was paid for as merchandise, not as baggage.

The finding is, that "she delivered seven packages of goods and wearing apparel; that the defendant, in addition to the money for her passage, then demanded of her payment of ten dollars as freight for the carriage of said packages over its road, which plaintiff paid; that defendant thereupon received said packages and contents and promised to transport them," &c. There is no exception to this finding.

There is no finding and no request to find that the defendant received the packages as extra baggage, or received any pay for their transportation as extra baggage.

There is no finding or proof that she in any manner

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concealed the contents of the packages from the defendant, or that she in any manner represented them as containing only her personal baggage; and the finding is that the defendant transported them as merchandise, not as baggage, extra or otherwise. It has become an axiom, that he who alleges error must affirmatively establish it. No presumption is indulged to reverse a judgment.

Under these circumstances, the question of the extent of plaintiff's baggage does not arise, and I think the defendant must pay for the whole property lost. See *Hannibal R. R. Co. v. Swift*, 1 *Am. Railw. Rep.* 434; 13 *Wall.* 262.

It is well settled that, in ordinary cases of transportation of freight, the carrier is responsible for a parcel, though ignorant of its contents, no matter how valuable, unless he made a special acceptance. This rule has some exceptions, and is qualified by the condition that the owner should have been guilty of no fraud or imposition in respect to the carrier, as by concealing the value or nature of the parcel, nor should he delude the carrier by his own carelessness in treating the parcel as a thing of no value. 2 *Kent. Comm.* 11th ed. 603; *Orange County Bank v. Brown*, 9 *Wend. (N. Y.)* 115. There was no such qualification in the case at bar.

I think it safe to say that if the carrier knew or had notice of the character of the goods taken as baggage and still undertook to transport them, he is liable for their loss, although they are not traveler's baggage. 2 *Redf. on Railways*, 149, 151, note 5, and cases.

But as I do not regard the question argued in the appellant's brief, as to the liability for goods assumed to be transported as extra baggage and paid for as such, as presented in the case, it is not necessary to consider it.

Michigan Southern, &c. R. R. Co. v. Oehm.

The judgment must be affirmed.

All concur.

Judgment affirmed.

THE MICHIGAN SOUTHERN & NORTHERN
INDIANA RAILROAD COMPANY v.
OEHM.

56 *Illinois*, 293.

Supreme Court of Illinois ; September Term, 1870.

Carriers. Baggage. In an action against a railway company to recover damages for the failure of the defendant to deliver within a reasonable time a trunk transported by the defendant as baggage of the plaintiff, a passenger on the defendants' railway, it appeared that the trunk contained masquerade costumes, which the plaintiff had undertaken to furnish for use at a ball, on the evening of the following day; but by the failure of the trunk to arrive in time, the plaintiff lost the benefit of her contract. It was not shown that she had informed defendants' servants of the contents of the trunk, and that it would be required the next day. *Held*, that the plaintiff, having shipped as personal baggage merchandise to be used in her trade, which could in no sense whatever be considered personal baggage, the defendants, not having notice of the contents of the trunk, were released from their liability as common carriers.

Appeal to the supreme court of Illinois from the superior court of the city of Chicago.

This was an action to recover damages for the loss

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of profits, alleged to have resulted from the failure of the defendant to deliver, within a reasonable time, a trunk received by the defendant as a common carrier of the plaintiff and her baggage.

The plaintiff had undertaken to furnish masquerade costumes to be used at a ball on the evening of December 25, 1868, at South Bend, Indiana. On the 24th she bought a passenger ticket on defendants' road from Chicago to South Bend, and checked, as baggage, two large trunks containing the costumes, paying for extra weight. One of the trunks did not arrive at South Bend in time for the ball, and the plaintiff lost the benefit of her contract. The trunk was returned to her, in a few days, at Chicago, with its contents wholly uninjured.

The jury found a verdict for the plaintiff. Judgment was entered for the plaintiff upon the verdict; from which the defendants appealed.

George C. Campbell, for the appellant.

Barber & Lackner, for the appellee.

LAWRENCE, Ch. J.—This judgment can not be sustained upon the evidence in the record. In order to recover, it was necessary for the plaintiff to show she informed defendants' servants of the contents of the trunks, and that they would be required the next day. Instead of doing this, the plaintiff checked the trunks as personal baggage. She is now endeavoring to hold the company responsible for a liability which it never consciously assumed. The company undertook to carry certain trunks as personal baggage, and to be accountable for their non-delivery in a reasonable time, but the plaintiff is seeking to charge it for the non-delivery of merchandise shipped to be used in the plaintiff's trade, and in no sense whatever capable of

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being considered personal baggage. The case is in principle like *Cincinnati, &c. R. R. Co. v. Marcus*, 38 Ill. 223.

An attempt was made in this case to charge the defendants with notice, but the evidence is wholly insufficient for that purpose. The plaintiff, by her own evidence, merely told the baggage-man who checked her trunks, in reply to his question where she was going, that she was going to the masquerade at South Bend. She does not state she gave the slightest information as to their contents, and the man himself swears he did not know their contents, or what business the plaintiff followed, although he knew her. We are wholly unable to see why he should have inferred, from what passed between them, that her trunks contained anything besides personal baggage. The verdict is wholly unsustained by the evidence.

Judgment reversed.

THE CHICAGO, ROCK ISLAND, & PACIFIC
RAILROAD COMPANY v. COLLINS

56 Illinois, 212.

Supreme Court of Illinois ; September Term, 1870.

Carriers. Loss of baggage. Evidence. In an action to recover from a railway company the value of a trunk and its contents alleged to have belonged to the plaintiff, and to have been lost while in charge of the defendant as baggage of the plaintiff when a passenger upon the defendant's railway, evidence was given at the

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trial tending to show that the trunk belonged to another person, who had taken it away from the defendant's station without the knowledge of the defendant, and had procured the plaintiff to sue for damages for its loss. *Held*, that this evidence of community of interest and design between these parties rendered admissible a letter in evidence which tended to show the existence of the conspiracy between them, written by the owner of the trunk to a stranger.

Carriers. Baggage. In an action against a railway company to recover the value of a trunk and its contents alleged to have been lost by the defendant while in its charge as baggage of the plaintiff, a passenger upon the defendant's railway, a verdict for the plaintiff including in the damages the value of two revolvers alleged to have been contained in the lost trunk,—*Held*, erroneous, on the ground that the revolvers were not necessary for the plaintiff's use on his journey; he being a grocer traveling into the country to purchase butter.

Appeal to the supreme court of Illinois from the superior court of the city of Chicago.

This was an action of trover for a trunk and its contents, alleged to have been lost while in charge of the defendant as a common carrier.

Upon the trial, the plaintiff, John Collins, testified to the delivery of the baggage to the defendant, his receipt of a check therefor, &c. ; that he had demanded the trunk but not received it. He also described the contents of the trunk ; among which were two revolvers. On cross-examination, he stated that he kept a grocery in Chicago, and on the occasion referred to was traveling into the country partly for his health and partly to purchase butter.

The testimony of other witnesses contradicted plaintiff's testimony in several important particulars, and tended strongly to show that the trunk was owned by one Thomas Duggan ; that Duggan had carried away the trunk from the station of the defendant, in the absence of the defendant's station agent ; and that the action was brought in the name of Collins but for the

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benefit of Duggan. The defendant offered in evidence a letter shown to be in the handwriting of Duggan, addressed to another person, a stranger to these transactions, as follows :

"Chicago, Ill.

"DEAR COUSIN :

"I would like to have your answer of the last letter, but you never sent me the answer. You will please answer this letter as quick as possible. Patt, please to tell anybody in Walcott that comes across you that a man of the name of Collins stopped in your house ; them checks that I took from Walcott belong to my chest. Collins took them in hand ; therefore, you act as I tell you, he intends to make money on it ; all that you got to say is, that a man of the name of Collins stopped in your house harvest months, so good day.

"From your affectionate cousin,

"THOMAS DUGGAN."

"Tell them it was about the 16th or 20th of July ; he cautions who you will talk about the subject, and without you asked never mention anything about it. Collins and me intends to make money on it. Direct your letter to 257 North Market-street to John Collins. Write back soon as ever you get this letter."

The plaintiff objected to the letter being received in evidence ; the court sustained the objection, and refused to allow the letter to be read. The defendant excepted. The jury found a verdict for the plaintiff, and judgment for the plaintiff was entered on the verdict ; from which the defendant appealed.

George C. Campbell, for the appellant.

Runyan & Avery, for the appellee.

SHELDON, J.—The first point made in this case is, upon the exclusion of the letter addressed to Pat-

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rick Manyon, when offered in evidence in the court below.

The letter was proved to be in the handwriting of Thomas Duggan. The evidence in the case tended strongly to show that John Collins was only a nominal party, and that the real party in interest was Thomas Duggan; that Collins had testified falsely as to three material facts—as to the description of the trunk, as to calling for it at Walcott, and as to stopping at Patrick Manyon's house. Instead of Collins calling for the trunk at Walcott on July 17, and staying at Manyon's the night of that day, as he testified, there was evidence that he never called for the trunk, and never was at Manyon's; but that Duggan was the man who took and carried away the trunk on that day from the platform of the station house at Walcott, in the absence of the station agent, with the check attached to the trunk, and brought it to Manyon's house, where he remained several weeks, having with him there two checks, the strap check and the loose check which is delivered to the owner of the baggage when the strap check is attached to it.

There was sufficient evidence of a community of interest and design between Collins and Duggan to have rendered this letter of Duggan admissible in evidence as against Collins, to show a conspiracy between them to defraud the railroad company.

The fact of Duggan having in his possession at Walcott, the check, especially connects the parties together, as being in concert and acting in co-operation.

Another objection taken is, that among the contents of the trunk, as testified to, were two revolvers, and that a recovery was had for them, as baggage, twenty-five dollars for each.

A common carrier of passengers is responsible for the baggage of a passenger.

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But what shall be deemed baggage becomes, under some circumstances, a question of doubt. In *Woods v. Devin*, 13 *Ill.* 746, this court said that the term "baggage" "includes such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection;" and that regard might be had to the habits and condition in life of the passenger.

The passenger, in this case, was a Chicago grocer, who had gone into the country, as he says, in quest of butter. His occupation or circumstances did not require that he should be furnished with any unusual store of deadly weapons, and we think he might have got along with one revolver. He should not have been allowed more than one revolver, as being reasonably necessary for his personal use or protection.

For error in both the above mentioned respects, the judgment is reversed and the cause remanded.

Judgment reversed.

DININNY v. THE NEW YORK & NEW HAVEN
RAILROAD COMPANY.

49 *New York*, 546.

Court of Appeals of New York; May Term, 1872.

Carriers. Baggage. A railway company's liability as a common carrier, for the baggage of a passenger, continues after the passenger has left the train, and until he has had a reasonable time and opportunity to remove his baggage. And it is the duty of the

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company to have its agent at hand to deliver baggage for a reasonable time after a train has arrived, and at all reasonable hours.

A passenger by defendant's railway, on arriving at her destination, late in the afternoon, could find no one to deliver her trunk; the defendant's baggage-master having, immediately upon the arrival of the train, placed her trunk in the depot and gone to his home. She waited fifteen minutes and then went away. Soon afterwards her son procured a conveyance and went to the depot for the trunk, but found the depot locked and the baggage-master still absent; it being then about eight o'clock in the evening. The son went to the residence of the baggage-master, and inducing him to come to the depot, delivered the check, and the trunk was brought to the door of the depot; but meantime the conveyance had gone, and as no other could be obtained, the trunk was left in charge of the baggage-master, and by him locked up again in the depot. During the night it was broken open and the contents carried away. In an action against the railway company to recover for the loss, the referee found that the demand for the trunk was made in reasonable time, and reasonable efforts made by the passenger to obtain it, but that there was no delivery by the defendant. *Held*, that the findings could not be disturbed, upon question of law; and under them, the defendant's liability as common carrier had not terminated at the time of the loss.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action to recover damages from the defendant for the loss of the contents of a trunk while in the possession of the defendant.

The wife of the plaintiff was a passenger over the defendant's road, with a trunk properly checked. The train on which she was, arrived at her destination at about half-past five in the afternoon. The baggage-master there, immediately on the arrival of the train, put the trunk into the depot and went away to tea at his own house, distant about one-fourth of a mile. The ticket-office was also closed. The plaintiff's wife waited about fifteen minutes and searched for some one

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to deliver her baggage but could find no one, and went away. After tea the plaintiff sent his son to get the trunk; he procured a conveyance to carry it, and reached the depot about eight o'clock. The depot was locked; the son thereupon went to the residence of the baggage-master, and induced him to go to the depot to deliver the trunk. Upon their arrival the baggage-master took the check and removed the duplicate from the trunk, and brought the trunk to the depot door, but it was then found that the man in charge of the conveyance had left with it and could not be found. No other could be obtained. The baggage-master consented to keep the trunk until morning, and locked it up again. The depot was entered by burglars during the night, the trunk broken open and its contents carried away.

The action was referred. The referee's findings sufficiently appear in the opinion. He reported in favor of the plaintiff, and judgment for the plaintiff was entered upon the report. The defendant appealed to the general term, which reversed the judgment, and directed a new trial. From this order of the general term the plaintiff appealed to the court of appeals.

George B. Bradley, for the appellant

D. Rumsey, for the respondent.

PECKHAM, J.—The supreme court reversed the judgment entered upon the report of the referee, and granted a new trial; but as it is not stated to have been reversed upon a question of fact, it is deemed to have been exclusively upon questions of law.

The referee found, upon evidence, that "the plaintiff caused the demand to be made for said trunk and contents within a reasonable time, and made reasonable efforts, and within a reasonable time, to demand

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and procure the trunk and contents; and that the defendant refused and neglected to deliver the contents of said trunk."

This finding, so stated, includes the finding that there was no delivery at all of the trunk and contents to the plaintiff; that what occurred at the depot some time after eight o'clock in the evening, when the plaintiff's son went there with a wagon for the trunk, was no delivery. Under these findings the defendant still held the trunk as a common carrier.

The responsibility of a common carrier, as to baggage, continues until the owner has a reasonable time and opportunity to receive, and take it away.

It is found in the case at bar that the plaintiff did not have such time and opportunity. This was by reason of the absence of the defendant's agent from the depot.

For fifteen minutes plaintiff's wife waited after the arrival of the cars and looked for this baggage. It seems the baggage-master had quietly and quickly put it in the depot room, and left the place for his dwelling, some quarter of a mile distant. It is no answer, it is idle to say she could not have carried home the trunk if she had found it. True; but she could and would have made an arrangement on that subject, and, it is presumed, would have fulfilled it and taken home the trunk that night, and thus prevented the loss.

That was the first and a plain neglect by the defendant. In proper season, immediately after tea, and at eight o'clock, the trunk is sent for; and at this time a wagon and horse are procured. Again the man in charge is absent, and, before the plaintiff's son could get him there, the horse-and-wagon man gets impatient and leaves. This is the second and plain neglect of the defendant. It plainly appears by the evidence

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that it was difficult on that day to get a wagon to transport baggage, and difficult to detain one unnecessarily. The defendant was bound to be there at the depot a proper and reasonable time at first for the delivery of that baggage. Not being so there, the baggage was locked up at defendant's peril. When plaintiff again, in a reasonable time, called for it, the master's negligent absence again prevented its delivery. The taking off of the check, &c., from the trunk, and its partial delivery to the plaintiff's son, under the impression by him that the horse and wagon were still there, was not a delivery. The departure of the horse, &c., occurred, be it marked, by reason of the neglect of the master to be there at the depot. The referee has found, necessarily, that the failure to await the return of the son who had gone in pursuit of the baggage-master was not unreasonable, under the circumstances; and, as the son testified, it was agreed by them, at the master's suggestion, that another could not be procured that night. Thus it plainly follows that the entire failure to remove the trunk that night was caused by defendant's negligence. In such case, the defendant's liability as a common carrier is not discharged.

Suppose the plaintiff, with a horse and wagon, had gone to the depot at eight in the evening, and waited with two men for two hours, while a third man was vainly hunting the baggage-master, and then, hearing nothing of him, had gone home; but the master arrived within ten minutes thereafter, when no team could be obtained that night; yet the man, supposing the wagon still there, had a partial taking of the baggage, as here, would it be contended there was any delivery?

The precise length of time a party shall wait for finding the master is not and can not well be settled as matter of law. It is found here, as matter of fact,

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that the waiting was reasonably long ; and no error in law is committed thereby.

The order of the supreme court should be reversed, and judgment absolute ordered for the plaintiff upon the finding of the referee.

FOLGER, and ALLEN, JJ., dissented.

Others concurred.

Order reversed. Judgment for the plaintiff.

**THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY v. WHITTON.**

18 *Wallace*, 270.

*Supreme Court of the United States ; December Term,
1874.*

Incorporation. Citizenship. Where rights of action are to be enforced by or against a railway company in the courts of the United States, it will be considered a citizen of the state by which it was incorporated, within the clause of the constitution of the United States extending the judicial power of the United States to controversies between citizens of different states.

It is no objection to the jurisdiction of a United States circuit court over an action brought by a citizen of one state against a railway company incorporated by the state in which the court is held, that the defendant is also a corporation under the laws of the state of which the plaintiff is a citizen, and, is, therefore, a citizen of the same state. The defendant can only be brought into court as a citizen of the state in which it is sued, whatever may be its status or citizenship elsewhere.

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Jurisdiction. Action for causing death. Where a right of action is given by a statute of a state, whenever the death of a person shall be caused by a wrongful act, neglect, or default against the person or corporation which would have been liable if death had not ensued, a proviso in such statute requiring such actions to be brought in some court established by the constitution and laws of the state does not prevent a non-resident plaintiff in such an action from removing the action to a circuit court of the United States, under the act of Congress of March 2, 1867.

The act of Congress of March 2, 1867, allowing such a removal of an action brought by a non-resident plaintiff, upon petition of the plaintiff, is constitutional and valid.

Error from the supreme court of the United States to the circuit court for the eastern district of Wisconsin.

This was an action by Henry Whitton against the Chicago & Northwestern Railway Company to recover damages for the death of the wife of Whitton, alleged by him to have been caused by the wrongful act and neglect of the railway company. The action was brought by the plaintiff as administrator of his wife's estate, under letters of administration granted in the state of Wisconsin; and was brought in one of the local courts of that state, under a statute of Wisconsin providing that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." The statute also provided that "every such action shall be brought

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by and in the name of the personal representatives of of such deceased person and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her ;" and that "the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just, in reference to the pecuniary injury resulting from such death, to the relatives of the deceased."

The action was brought in 1866. While the case was pending, on March 2, 1867, Congress passed an act (14 *U. S. Stat. at L.* 558) amending the act of July 27, 1866, "for the removal of causes in certain cases from state courts." The amendatory act provided that in cases then pending,* or which might be subsequently brought in a state court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court," and have the cause removed to the circuit court of the United States for the district.

After the passage of this act the plaintiff filed his petition in the state court in which the action was brought and was still pending, for the removal of the cause to the circuit court of the United States for the eastern district of Wisconsin, under this act. The petition set forth that the plaintiff then was and had been for the three years previous, a resident and citizen of Illinois ; that the defendant was a corporation created by the laws of Wisconsin ; and that the mat-

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ter in dispute exceeded the sum of five hundred dollars, exclusive of costs. He also filed the affidavit required by the act, and offered the necessary security.

The defendant opposed the petition upon affidavits stating that the defendant was a corporation created and existing under the laws of the states of Illinois, Wisconsin, and Michigan; that its railway was located and operated in all those states; that its entire line was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exercised and its affairs managed and controlled by a single board of directors and officers; that its principal office and place of business was in the state of Illinois, at the city of Chicago, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin.

The state court ordered the removal of the action; but directed a stay of proceedings to enable the defendant to appeal from the order to the supreme court of Wisconsin; and also directed that, if the appeal should be taken, all proceedings should be stayed until it should be determined.

The defendant took an appeal, accordingly; but the plaintiff disregarded the stay, and procured copies of the papers in the cause from the state court which he filed in the United States circuit court, upon which the latter court took jurisdiction of the cause. The defendant thereupon moved in the circuit court that the cause be dismissed, upon the ground of the stay directed by the state court; but this motion was denied. The plaintiff having filed a new declaration in the circuit court, the defendant pleaded in abatement to the jurisdiction of the court; the plea being founded on the proviso to the statute of Wisconsin under which the action was brought, requiring such actions to be brought in some court established by the

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constitution and laws of that state. The plaintiff demurred to this plea in abatement, and the demurrer was sustained. The defendant then pleaded the general issue.

Subsequently, the supreme court of the state, upon the appeal to that court from the order of removal, reversed that order, resting its decision on the ground that the plaintiff, having originally the right to pursue his remedy either in a United States court or a state court, had elected to sue in the state court, and had thereby waived his right to resort to the United States court. Thereupon the defendant moved in the circuit court that the cause be remanded to the state court; but the motion was denied.

Upon the trial, the jury found a verdict for the plaintiff. The defendant moved for a new trial, but this was refused, and judgment was entered upon the verdict. To review the judgment the defendant brought this writ of error.

T. A. Howe, for the plaintiff in error.

J. A. Sleeper, for the defendant in error.

FIELD, J. [After stating the case].—The jurisdiction of the action by the federal court is denied on three grounds; the character of the parties as supposed citizens of the same state; the limitation to the state court of the remedy given by the statute of Wisconsin; and the alleged invalidity of the act of Congress of March 2, 1867, under which the removal from the state court was made.

First. As to the character of the parties.

The plaintiff is a citizen of the state of Illinois and the defendant is a corporation created under the laws of Wisconsin. Although a corporation, being an artificial body created by legislative power, is not a citi-

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zen within several provisions of the constitution, yet it has been held, and that must now be regarded as settled law, that, where rights of action are to be enforced, it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states. *Paul v. Virginia*, 8 *Wall.* 177. The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it in the case of *Ohio, &c. R. R. Co. v. Wheeler*, 1 *Black.* 286.

In that case the declaration averred that the plaintiffs were a corporation created by the laws of the states of Indiana and Ohio, and that the defendant was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the state which created it, and, therefore, that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against a citizen of the latter state, and, of course, could not be maintained in a court of the United States where jurisdiction of the case depended upon the citizenship of the parties. The court also observed that though a corpo-

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ration by the name and style of the plaintiffs in that case appeared to have been chartered by the states of Ohio and Indiana, clothed with the same capacities and powers, and intended to accomplish the same objects, and was spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states, yet it had no legal existence in either state, except by the law of that state; that neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised, and that though composed of and representing, under the corporate name, the same natural persons, its legal entity, which existed by force of law, could have no existence beyond the territory of the state or sovereignty which brought it into life and endowed it with its faculties and powers.

The correctness of this view is also confirmed by the recent decision of this court in the case of Baltimore, &c. R. R. Co. v. Harris, 1 *Am. Railw. Rep.* 559; 12 *Wall.* 65.

In that case, a Maryland railroad corporation was empowered by the legislature of Virginia to construct its road through that state, and by an act of Congress to extend a lateral road into the District of Columbia. By the act of Virginia, the company was granted the same rights and privileges in that state which it possessed in Maryland, and it was made subject to similar pains, penalties, and obligations. By the act of Congress, the company was authorized to exercise in the District of Columbia the same powers, rights, and privileges in the extension and construction of the road as in the construction and extension of any railroad in Maryland, and was granted the same rights, benefits, and immunities in the use of the road which were provided in its charter, except the right to construct from its road another lateral road. And this

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court held that these acts did not create a new corporation either in Virginia or in the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that state and district. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations and made it subject to suit in Virginia and in the District. "The corporation," said the court, "can not migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly. For the purposes of federal jurisdiction it is regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted."

Second. As to the limitation to the state court of the remedy given by the statute of Wisconsin.

That statute, after declaring a liability by a person or a corporation to an action for damages when death ensues from a wrongful act, neglect, or default of such person or corporation, contains a proviso "that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." This proviso is considered by the counsel of the defendant as in the nature of a condition, upon a compliance with which the remedy given by the statute can only be enforced.

It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the state. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the limits of the state. But when death does thus ensue from any of those

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causes, the relatives of the deceased named in the statute can maintain an action for damages. The liability within the conditions specified extends to all parties through whose wrongful acts, neglect, or default death ensues, and the right of action for damages occasioned thereby is possessed by all persons within the description designated. In all cases where a general right is thus conferred, it can be enforced in any federal court within the state having jurisdiction of the parties. It can not be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. The statutes of nearly every state provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the federal court over such suits, where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property, or personal rights, or injuries to either is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation.

This doctrine has been asserted in several cases by this court. In *Suydam v. Broadnax*, 14 *Pet.* 67, an act of the legislature of Alabama provided that the estate of a deceased person, declared to be insolvent, should be distributed by the executors or administrators according to the provisions of the act, and that no suit or action should be commenced or sustained against any executor or administrator after the estate had been declared to be insolvent, except in certain cases; but this court held, in a case not thus excepted, that the insolvency of the estate, judicially declared

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under the act, was not sufficient in law to abate a suit instituted in the circuit court of the United States by a citizen of another state against the representatives of a citizen of Alabama. "Section 11 of the act to establish the judicial courts of the United States," said the court, "carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States, and gives to the circuit court 'original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law and in equity,' &c., &c. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court."

In the *Union Bank of Tennessee v. Jolly*, 18 *How.* 506, this court declared that the law of a state "limiting the remedies of its citizens in its own courts can not be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there to which they may be legally or equitably entitled." The same doctrine was affirmed in *Hyde v. Stone*, 20 *How.* 170, and in *Payne v. Hook*, 7 *Wall.* 425.

Third. As to the alleged invalidity of the act of March 2, 1867, under which the removal from the state court was made.

The counsel of the defendant, while confining his special objection to this act, questions the soundness of the reasoning of Mr. Justice STORY, by which any legislation for the removal of causes from a state court to a federal court is maintained. We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate

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jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the federal court acquires original jurisdiction of the causes. *Dennis-toun v. Draper*, 5 *Blatchf.* 340. But it is not material whether the reasoning of the distinguished jurist in this particular is correct or otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the judiciary act of 1789.

The judicial power of the United States extends by the constitution to controversies between citizens of different states as well as to cases arising under the constitution, treaties, and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the constitution, are mere matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all state authority; in other cases it may be made so at the option of Congress, or it may be exercised concurrently with that of the states.

Such was the opinion of Mr. Justice STORY, as expressed in *Martin v. Hunter*, 1 *Wheat.* 334, and this conclusion was adopted and approved by this court in the recent case of *The Moses Taylor*, 4 *Wall.* 429, decided at the December term, 1866. The legislation of Congress has proceeded upon the correctness of this position in the distribution of jurisdiction to the federal courts. The judiciary act of 1789, as observed in the case of *The Moses Taylor*, declares, "that in some cases from their commencement such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against

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consuls and vice-consuls, except for certain offenses, are placed from their commencement exclusively under the cognizance of the federal courts. On the other hand, some cases in which an alien or a citizen of another state is made a party may be brought either in a federal or a state court at the option of the plaintiff, and if brought in the state court may be prosecuted until the appearance of the defendant, and then at his option may be suffered to remain there or may be transferred to the jurisdiction of the federal courts. Other cases not included under these heads, but involving questions under the constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases which by the judiciary act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts, at earlier stages, upon the application of the defendant. The constitutionality of these provisions can not be seriously questioned, and is of frequent recognition by both state and federal courts."

When the jurisdiction of the federal court depended upon the citizenship of the parties, the case could not be withdrawn from the state courts after suit commenced, until the passage of the act of 1867, except upon the application of the defendant.

The provision of the constitution extending the judicial power of the United States to controversies between citizens of different states had its existence in the impression that state attachments and state prejudices might affect injuriously the regular administration of justice in the state courts. The protection intended against these influences to non-residents of a

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state was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a state court a like election to the defendant afterward. The time at which the non-resident party should be allowed thus to make his election was evidently a mere matter of legislative discretion, a simple question of expediency. If Congress had subsequently become satisfied, that where a plaintiff discovers, after suit brought in a state court, that the prejudice and local influence, against which the constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be permitted to remove his case into a national court, it is not perceived that any constitutional objection exists to its authorizing the removal, and, of course, to prescribing the conditions upon which the removal shall be allowed.

It follows, from the views we have expressed, that the objection to the jurisdiction of this action by the circuit court upon the grounds advanced by the defendant, can not be maintained. It only remains to say a few words upon the refusal of the court to give the instructions prayed by the defendant, and upon its ruling in the admission of certain evidence, and its charge to the jury.

The facts of the case are very few, and with respect to most of them there was little conflict of evidence. [The learned justice here stated the facts of the case, and continued:] Upon these facts the court gave to the jury a clear and full charge upon the duties and responsibilities of the railroad company in crossing the street of the city with its engines and trains, and upon the care, prudence, and caution which it was incumbent upon the deceased to exercise in crossing the tracks; and as to the damages which the jury were authorized to find in case they were satisfied that the

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employees of the company had been guilty of negligence, and that such negligence had caused the death of the deceased.

The counsel of the plaintiff had requested three special instructions to the jury, and the counsel of the defendant had requested nineteen special instructions. The court, however, declined to give any of them, except as they were embraced in its general charge. Some of the instructions prayed by the defendant presented the law respecting the liability of the company correctly, and some of them were based upon an assumed condition of things which the evidence did not warrant. But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms in particulars considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence. The propriety of the rulings of the court in this case is fully vindicated in its opinion on the motion for a new trial. The evidence of the condition of the deceased—that she was enceinte at the time of the accident—could not materially have affected the jury in the estimation of the damages after the clear and explicit charge of the court, as to the character of the damages which only they were authorized to consider. The other evidence in the case, to the admission of which objection was taken, was not material, and could not have influenced the result.

Judgment affirmed.

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WHITAKER v. THE EIGHTH AVENUE RAIL-
ROAD COMPANY.

51 New York, 295.

*Commission of Appeals of New York; January
Term, 1873.*

Injury to person. Street railways. A street railway, although within the bounds of a public highway, is not itself a "public highway," within the meaning of a statute making the owner of every vehicle running upon any public highway, for the transportation of persons, liable for all damages occasioned by the willful act of any one in his employ as a driver of such vehicle while driving the same; and for any injury resulting from such willful act of the driver of a car upon such a street railway, the owner of the car is not liable.

Evidence. In an action under such a statute to recover damages for a willful injury inflicted by a driver of the defendant's vehicle, the declarations of the driver are not admissible in evidence against the defendant unless it appears affirmatively that they were made at the time the injury was inflicted.

Appeal to the commission of appeals of New York from the general term of the superior court of the city of New York.

This was an action by John Whitaker to recover damages from the Eighth Avenue Railroad Company, a street railroad company in the city of New York, for an injury to his person caused by the willful act of a driver of one of the defendant's cars, in driving the car against the plaintiff.

Upon the trial, the plaintiff's counsel, in opening the case, stated that the action was brought to recover damages of the defendant for the willful act of its

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driver in running against the plaintiff. The defendant thereupon moved that the plaintiff's complaint be dismissed, upon the ground that the defendant was not liable for the consequences of the act complained of, the same being willful. The motion was denied, the court holding that under the statute of New York (3 *N. Y. Rev. Stat.* 965, §§ 6, 7) making the owner of every carriage or vehicle used for the transportation of persons running upon any public highway liable for all damages done by the willful act of any person in the employment of such owner as a driver, the defendant would be liable for the act complained of. The defendant excepted to this decision.

The trial of the cause was conducted throughout upon the theory that the defendant was liable for the willful act of its driver in running the car he was driving along the track of the defendant's road against the plaintiff while standing in the public highway, so near the defendant's track that the cars in passing came in contact with his person and caused him to fall in an excavation adjoining the track, from which act of the driver the injury resulted for which suit was brought. To sustain the plaintiff's allegation of the driver's intent to do him an injury, his counsel asked a witness who was present at the time of the collision whether, after the car passed, he heard the driver say anything; the witness answered "he was cursing, and said 'damn him, let him fall in and be killed.'"

The defendant objected to the admission in evidence of this declaration of the driver, made after the occurrence complained of; but the court overruled the objection, holding that the declaration was a part of the transaction, and therefore admissible. The defendant excepted to this decision. The jury found a verdict in favor of the plaintiff. The exceptions taken were ordered to be heard, in the first instance, at the general term. The general term denied a new trial, and

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directed judgment for the plaintiff to be entered upon the verdict. From this judgment the defendant appealed to the commission of appeals.

John M. Scribner, Jr., for the appellant.

John Townshend, for the respondent.

GRAY, Com.—At common law the liability of the owner of a vehicle used for the transportation of persons, for injuries resulting from the acts of his driver, extends to those injuries only which result from the driver's misjudgment or negligence while engaged for the owner in his vocation as a driver. *Wright v. Wilcox*, 19 *Wend. (N. Y.)* 344, 345; *Hibbard v. New York, &c. R. R. Co.*, 15 *N. Y.* 467; *Mali v. Lord*, 39 *Id.* 383; *Fraser v. Freeman*, 43 *Id.* 566; *Isaacs v. Third Avenue R. R. Co.*, 47 *Id.* 122. The theory upon which this action was brought and tried can not be upheld, unless it is within the act entitled "Of the law of the road, and the regulation of public stages" (3 *N. Y. Rev. Stat.* 3d ed. 965, §§ 6, 7), making the owner of every vehicle running upon any public highway, for the transportation of persons, liable for all damages occasioned by the willful act of any one in his employ as a driver of such vehicle while driving the same; and this presents the question whether the road traversed by the defendant's cars was a public highway. The act referred to is but a compilation, in 1830, of the substance of previous acts, and applies in all its provisions to the whole road, and was intended to regulate the conduct of those who can and have the right, under the regulations prescribed by it, to use any part of the road; and was passed long before any street railway was chartered in this state. Street railways were, it is true, within bounds of public highways; but that portion of the public highway upon which the

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track is authorized to be laid is necessarily so set apart for the exclusive use of the owner of the car and the track as not to permit any one of the public, in passing over the highway, to interfere with the running of such car, or with the track upon which it is run, to the unnecessary hindrance of the business of its owner. *Hegan v. Eighth Avenue R. R. Co.*, 15 *N. Y.* 380, 382. The first section of the act relied upon demonstrates its inapplicability to street railways, and to the drivers of cars upon them. It requires carriages meeting upon a public highway to turn to the right of its center ; a regulation very difficult, if not quite impossible, to be complied with by the driver of a street car. It is true, also, that every railway for the transportation of persons is for public use. It is, nevertheless, the private property of its owner ; and although the highway over which it passes remains a public highway, consistent with the unimpaired use of the railway, the railway itself is, notwithstanding, in the uses for which it was constructed, a private road for the accommodation of the public and the profit of its owners, upon which no one but its owners has the right to run a car. Such a road could not have been in contemplation of the framers of the act referred to, and is manifestly not a public highway within its meaning. There is another respect in which the court erred. Conceding the act of the driver to have been a wanton act, and that the defendant should be responsible for its consequences, it being an act for which no fault could be imputed to the defendant, the evidence to establish it should be such as the party seeking to establish it is clearly entitled. While one is engaged in an act, and the intention with which he is acting is a proper subject of inquiry, his declarations, made at the time, may be given in evidence to characterize the act. The declarations received in evidence were not made at the time of the act complained of, but after the driver, with his

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car, had passed the place of the collision. It did not appear whether it was at the moment the car passed or how long afterward. It is enough, where the object is to visit the consequences of a wanton act upon a party who, for aught that appears, believed its driver to be free from the wantonness imputed to him, that it did not appear affirmatively that the declarations were made when they could properly be regarded as made at the time the injury was inflicted. *Luby v. Hudson River R. R. Co.*, 17 *N. Y.* 131, 133.

I am, therefore, of opinion that each exception was well taken, and that the judgment appealed from should be reversed, and new trial ordered, costs to abide event.

All concurred in the last ground discussed in opinion.

Lott, Ch. Com., concurred in the whole opinion.

Judgment reversed.

Unger v. Forty-second Street, &c. R. R. Co.

UNGER v. THE FORTY-SECOND STREET &
GRAND-STREET FERRY RAILROAD
COMPANY.

51 *New York*, 497.

*Commission of Appeals of New York; January
Term, 1873.*

Negligence. Injury to person. Street railways. The rule that railway companies whose cars are drawn by steam at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines and in the management of their roads, does not apply to street railway companies who are merely carriers of passengers upon street cars drawn by horses. And as to pedestrians using a street in common with a street railway company, no greater degree of care is required of such company than is required of the driver or owner of any other vehicle.

Thus, a street railway company is not bound, in attaching horses to its cars, to use the best method human skill and ingenuity have devised to prevent accidents. Its duty as to travelers upon the streets as well as to passengers, is discharged if the horses are attached in the way in general use, and which has been found reasonably adequate and safe. And if the horses escape, without any fault of the driver or of the company, and injure a person in the street, the company is not liable for the injury.

Appeal to the commission of appeals of New York from the general term of the superior court of the city of New York.

This was an action by Elizabeth Unger to recover damages from the Forty-second street and Grand street Ferry Railroad Company for personal injuries

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to her caused by a team of horses which had escaped from one of the defendant's street cars. The facts are stated in the opinion. Upon the trial, the jury found a verdict for the plaintiff. The defendant, upon a case made, moved at special term for a new trial, and the motion was granted. From the order granting the new trial the plaintiff appealed to the general term, which affirmed the order; and from the order of the general term the plaintiff appealed to the commission of appeals.

Samuel Hand, for the appellant.

Moses Ely, for the respondent.

EARL, Com.—In this case the jury rendered a verdict for the plaintiff, and the defendant, upon a case made and settled, moved for a new trial at special term, and the motion was granted. It may have been granted upon questions of fact. There is nothing in the record showing that it was not. Hence the proper course for us to pursue is to dismiss the appeal on the ground that it brings nothing before us which we can review, or to affirm the order on the ground that it does not appear that the court erred in granting it. *Dickson v. Broadway, &c. R. R. Co.*, 47 N. Y. 507.

I prefer the latter course because both parties have asked us to examine and pass upon the merits of the case, and because it is quite clear that there was ample ground for granting the new trial for error of law.

In the evening of January 1, 1864, the plaintiff was passing upon one of the streets of the city of New York, and the defendant's team came dashing along, with a pole and whiffletrees attached to them, at a furious rate and ran over her. On the trial she called

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witnesses who saw the team run over her, and who knew the nature and extent of her injuries; but she did not call a witness who saw how the horses became detached from the car, or who knew what caused them to run away. The only witness she called upon the subject testified that he sat in the front part of the car, in the corner; that the car all at once stopped, and he looked out and saw the horses running away; that he saw the horses had been attached to the car by a hook, standing upright, which appeared to have been broken off at some time, and that he did not see any one interfere with the horses. The witness did not testify that he was looking when the horses became detached, but that his attention was attracted by the stopping of the car, and that he then looked and saw the horses running away from the car. But this was sufficient to make out a *prima facie* case. The fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant. Hence, the court committed no error in refusing to nonsuit the plaintiff at the close of her evidence. But, after the close of her evidence, the defendant proved by two witnesses (one the driver and the other a police officer) precisely how the horses became detached from the car, and were caused to run away. The driver stopped the car to take on some ladies; and at that time two intoxicated men came along and caught hold of the horses, and one of them struck one of the horses on the head, and the other caught hold of the reins and pulled them out of the driver's hands, and then the horses backed and got loose from the car and ran away. This is all the evidence upon the subject. There is nothing to cast suspicion or doubt upon the truthfulness of the witnesses, and we must take their evidence as true.

It thus appears that the horses got loose and ran away without any fault whatever of the driver, and I

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can perceive no principle upon which the defendant can be held liable. A person driving horses through a street is not bound absolutely to keep them under control. He is bound to exercise that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise under the same circumstances.

But it is claimed on the part of the plaintiff that there was some defect in the hook by which the whiffle-trees were attached to the car. One of the plaintiff's witnesses testified that a piece of the hook appeared to have been broken off at some time before the accident; but there was no evidence tending to show that this in any way impaired the usefulness of the hook; and it did not appear that this defect in the hook in any way contributed to the accident.

It also appeared that the whiffle-trees could have been fastened into the hook with a pin, so that they could not have slipped out unless the pin broke. But the proof showed that this hook was made and the whiffle-trees attached in the manner usual upon other roads. While it may be true that the team is more securely attached to the car by the use of the pin, that is not the only thing to be considered. Regard must be had to convenience and practicability, and to the safety of the passengers. The team should be so attached that it can be easily detached in any emergency. Hence, upon all the evidence in the case, no jury could properly determine that even the greatest degree of care would require that the pin should be used with the hook. But the learned counsel for the appellant argues that a street railway company is bound to adopt every improvement and to use every precaution for the purpose of meeting an unforeseen occurrence, and preventing injuries to travelers upon the streets as well as passengers in the cars; and he seeks to apply the same rule, as to diligence and care, which has

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in many cases been applied to railway companies, whose cars are drawn by steam, in the construction of their cars, with the view to the safety of passengers therein. The argument is clearly unsound. The degree of care which a person owing diligence must exercise depends upon the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. Railroad companies, whose cars are drawn by steam, at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger from their hazardous mode of conveyance to human life in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage coaches (*Hegeman v. Western R. R. Co.*, 13 *N. Y.* 9); and, for the same reason, is not required from the carriers of passengers upon street cars drawn by horses. The degree of care required in any case must have reference to the subject-matter, and must be such only as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. In some cases this rule will require the highest degree of care, and in others much less.

But whatever degree of care may be required of street railway companies, as to the passengers which they carry, their cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicles drawn by horses; and there can be no more danger from the horses attached to the street cars than from horses attached to any other vehicle; and, hence, no more care can be required of street railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle. It would be a very hard and unwise rule which would require of the

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owner of every vehicle driven in the streets of a city that he use, in the construction of his carriage and in the harness of his horses, and all the means by which they are attached to the vehicle, the best methods which human skill and ingenuity have contrived and brought into use to prevent accidents to pedestrians in the streets. Such a rule has not and probably never will be adopted.

I hold, therefore, that the defendant was not required to adopt an unusual and, perhaps, untried method of attaching its horses to the cars. It discharged its duty in that respect to pedestrians who had the right to use the streets in common with it if it attached them in the way which was in general use and which had been found reasonably adequate and safe.

I am, therefore, of the opinion that the motion to nonsuit the plaintiff, at the close of all the evidence, should have been granted; and this leads to an affirmation of the order of the general term, and judgment absolute against the plaintiff for costs.

All concurred.

Order affirmed. Judgment for defendant.

Chicago, &c. R. R. Co. v. Dignan.

THE CHICAGO, ROCK ISLAND, & PACIFIC
RAILROAD COMPANY v. DIGNAN.56 *Illinois*, 487.*Supreme Court of Illinois; September Term, 1870.*

Negligence. Injury to person. In an action against a railroad company to recover for personal injuries received by the plaintiff, it appeared that at the place where the injury was received, the tracks of the defendant and another company were only six or seven feet apart. The plaintiff, being in the employ of the other company, was engaged, with others, in replacing a rail upon the track of that company, when a train of cars approached the workmen, unobserved by them until nearly upon them, when they were alarmed by the shouting of a brakeman, and hastily jumped backward to the end of the ties on the defendant's track. While standing there waiting for the train to pass, the plaintiff and one of his fellow-laborers were struck by two freight cars belonging to defendants, which were moving in the same direction as the train on the other road, by their own momentum, having been uncoupled from a train while in motion, and left quietly to run along the track without any person upon them to check their motion or to give an alarm. *Held*, that a verdict for the plaintiff must be sustained. The defendant was chargeable with negligence in the manner of running its cars, and the plaintiff could not be charged with such contributory negligence as would defeat a recovery by him because of his omission, under the excitement and alarm of the occasion, to look along the track of defendant's road to see if there might not be a train approaching, although he had time to do so before the collision.

Appeal to the supreme court of Illinois from the superior court of Chicago.

This was an action by Michael Dignan to recover damages from the Chicago, Rock Island, & Pacific Railroad Company for personal injuries received by

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the plaintiff from the defendant's cars. The facts are stated in the opinion. The jury found a verdict for the plaintiff, and judgment was entered for the plaintiff accordingly. From this judgment the defendant appealed.

George C. Campbell, for the appellant.

Tom Stuart Dickson, and *Hervey, Anthony, & Galt*, for the appellee.

LAWRENCE, Ch. J.—This was an action brought by Michael Dignan against the Chicago, Rock Island, & Pacific Railroad Company, to recover damages for injuries received by the plaintiff from being run over by a train of cars belonging to said company. It appears the defendants and the Michigan Southern Railway Company use the same grounds in the city of Chicago, the main tracks of the respective companies being between six and seven feet apart. At and near the place where the injury occurred numerous side tracks are connected with the main tracks by switches. The plaintiff was a track repairer, in the employ of the Michigan Southern company, and in October, 1869, was engaged, with two other men, in replacing a rail on the track of this company. While thus engaged, they were interrupted by a long train of freight cars passing over the track. The train was backing slowly and they did not discover it until nearly upon them, when their attention was arrested by the shouting of the brakeman on the rear car, and they hastily jumped backwards to the end of the ties on the track of the defendants. While standing there, waiting for the train to pass, the plaintiff and one of his fellow-laborers were struck by two freight cars belonging to the defendants. The plaintiff fell in such a manner that he was passed over by the cars and his arm was crushed, and he was other-

wise severely injured. His companion, who was also struck, so fell that he was not seriously injured. The third laborer was not touched. These two cars were moving northwardly, in the same direction with the train on the other track. They, with several other cars, had just before been taken from a side track to the main track, over a switch south of where these men were standing, and then had been backed up the main track. When the train had acquired sufficient momentum, the two rear cars were uncoupled and continued on their course from the motion already acquired, while the locomotive with the other cars moved off in the opposite direction. These two cars, thus left quietly to move along the track by their own momentum, without any person upon them to check their motion or to give an alarm, were the cars which struck the plaintiff.

It is not objected that the damages are excessive. Objection is taken to the modification by the court of defendants' instructions, but this modification was in accordance with the well settled principles so frequently announced by this court in regard to comparative negligence. There is no error in the record unless in the refusal of the court to set aside the verdict as not sustained by the evidence, and we have very carefully examined the testimony, which is a little obscure, but the application of which to the diagram contained in the record we think we understand, and have, with some hesitation, concluded that the judgment must be affirmed.

We have no doubt as to the negligence of the defendants. Every person who has had frequent occasion to visit the grounds of a railway company where freight trains are made up, must have observed how noiselessly one or two empty freight cars will move along the track after having been uncoupled from the locomotive or from the main body of the train, and

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what a distance they will pass over by their own momentum. That it is negligence to set a car or a couple of cars in motion, and, after giving them a momentum that will carry them onward at the rate of three or four miles an hour, to disconnect them from all controlling power, and allow them to move along where workmen are engaged, with their attention absorbed by their employment, and where persons are constantly passing to and fro, with no one on the cars to apply a brake or sound an alarm,—that this, we say, is negligence, is a proposition which can not well be denied. The sense of hearing alone will give warning of the approach of an ordinary train, but one of these cars, thus set in motion, gives to the ear no token of its approach, and it is undoubtedly true that many a life has been destroyed, and many a limb crushed, by agencies substantially like those disclosed by this record. The plaintiff offered in evidence various rules of the company, one of which expressly forbids what are called “flying switches.” The mode of switching adopted in the present case, it appears by the evidence, was not what is technically called a “flying switch,” but it seems to us to possess substantially the same elements of danger. In this case, as in the flying switch, cars are left to pursue their own way along the rail, with no person to control or check their course or to give warning of their approach, and with a speed which, though slow, is the more noiseless for being slow, and is still sufficient to prostrate whatever person the cars may strike.

But the counsel for appellants, in his argument, relies chiefly on the alleged negligence of the plaintiff as a ground for reversal, and we certainly have not found the question free from difficulty. If the testimony of the plaintiff himself and that of the witness Mesner, who was struck by the car at the same time, stood alone, there would be no doubt. They both swear

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that when they stepped back from the track of the Michigan Southern company, they cast a glance in each direction along the track of the defendants, and no train was on the track. They also swear that about fifteen cars had passed on the track of the Michigan Southern before they were struck. The theory of the case presented by their testimony would be that the train of the defendants, of which the two cars in question were a part, had not come from the side track on the main track when the plaintiff and the witness Mesner stepped back from their work. They had no reason, therefore, to anticipate sudden danger from that direction, and if their testimony is correct, when the two cars were uncoupled, the persons in charge of the train, or at least the man who uncoupled the cars, might have seen they would almost certainly run down the men who were standing so near the track with their attention absorbed by the other train. Here, then, would be the most wanton recklessness on the part of defendants' employes, with no want of ordinary care on the part of the plaintiff.

But we are of opinion that the other testimony in the case, and other portions of their own testimony, refute the statement that the cars of the defendants were not on the main track and moving northward at the time the plaintiff stepped back from his work.

Joseph Smith, a witness called by the defendants, swears that he was on the hind car of the train on the Michigan Southern road as it was backing north. He saw these men at work as the train slowly approached them, and they did not get out of the way. When within two car lengths of them he shouted to them to get off his track, which they immediately did by stepping to the other track. Just then he discovered the two cars moving in the same direction with his own train, on the defendants' road, the first car being only about a car length behind the end of the train where

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he was standing. Then he says, quoting his own language, "I halloosed to them again, and told them to look out for the cars. They did not have time to get off, for my train was only about a car length ahead."

This witness is disinterested, and was in a position to know the precise manner in which the accident occurred, and is corroborated by other witnesses. We have no doubt he states the case truly, and in this we agree with the counsel for appellants.

On this view of the facts can the plaintiff be charged with not having exercised ordinary diligence? We readily concede that a person coolly approaching a railway, with intent to cross it, and knowing that trains are liable to pass at any moment, would be guilty of carelessness if he did not look in both directions for an approaching train. But the question of negligence can be measured by no fixed and unbending rule. Each case must be tested by its own peculiar facts. An act which might justly be regarded as inexcusably careless if done coolly and deliberately, and with nothing to disturb the ordinary action of the brain, may, on the other hand, be pardoned as not unnatural if done under the excitement of sudden peril and alarm. How is the act of the plaintiff to be regarded in this case, and would it be just to apply to him, under the circumstances, the rule applied by this court in the case of *Chicago, &c., R. R. Co. v. Sweeney*, 52 Ill. 325, cited by plaintiff's counsel?

The three men were engaged in spiking the inside rail, and so intent upon their labor that they neither saw nor heard the train approaching on their own track. When it was but two car lengths distant, they were suddenly alarmed by the shout of the brakeman and started back, as almost all men would have done under the circumstances, on the same side of the track upon which they were at work. They did not step

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within the rails of the defendants' road, but in their natural anxiety to place themselves beyond all danger, two of them stepped back two or three feet further than was necessary, and thus brought themselves within reach of the projecting cars, as they passed on the defendants' line. As they stepped back, their attention was of course engaged by the danger they were escaping, and the shouting of the brakeman, and they were probably not conscious how near the defendants' road they placed themselves. The brakeman again shouted, but, as he testifies, before they had time to get out of the way the defendants' cars had struck them. We do not suppose there was not sufficient time for the plaintiff to have turned his head in each direction, and have looked north and south along defendants' road, before the collision. But, we are of opinion that he can not be charged with having shown less than the prudence of ordinary men merely because, in the hurry and excitement of his unpremeditated movement to escape from danger on one line he forgot, for a few seconds, that he might be exposing himself to it on the other.

In examining this case it is worthy of observation that here were three men each acting for himself, and none of them, we must suppose, desirous of exposing himself to the loss of life or limb, all doing precisely the same thing under the influence of a sudden alarm. The fact that they all acted alike, certainly tends to show that they did what it would have been natural for men in general to do under like circumstances. The fact that one of them did not step back quite so far as the other two, and thus escaped injury, was probably accidental, and we have little doubt that they were all for the moment entirely unconscious that either of them was liable to injury from cars on the defendants' road. It would, we think, be unreasonable and unjust to say that this plaintiff is to be

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charged with such negligence as will bar his recovery in this case, merely because he did not use all the means to guard against the danger of an approaching train which may properly be required of one who places himself upon a railway line under no circumstances of excitement, and with nothing to divert his attention from the fact that his position is one of peril.

These are the conclusions at which we have arrived after a full examination of the case. The defendants are chargeable with carelessness. The plaintiff, under the peculiar circumstances, can hardly be said to have acted otherwise than most men of ordinary prudence would have acted under similar circumstances. The case is certainly not free from doubt, but it is impossible to say that the verdict is clearly unsupported by the evidence.

The difference between this case and that of Chicago, &c. R. R. Co. v. Sweeney, cited by counsel for appellants, and above referred to, is very palpable, both as to the question of negligence on the part of the company, and that of the absence of negligence on the part of the plaintiff.

Judgment affirmed.

Indianapolis, &c. R. Co. v. Carr.

THE INDIANAPOLIS, BLOOMINGTON, & WEST-
ERN RAILWAY COMPANY v. CARR.85 *Indiana*, 510.*Supreme Court of Indiana; May Term, 1871.*

Negligence. Injury to person. Contributive negligence. In an action against a railway company for negligently causing the death of the plaintiff's intestate, it appeared from the evidence that the deceased, with others, were at work in the employment of another railway company, and at a point upon its track where a train of cars owned and run by defendant was backing; that the bell of the locomotive was ringing; that there were four or five cars in the train and no method of communicating with the engine from the rear of the train; nor was there any brake in working order on the car furthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train; nor was any person in advance of the train to warn others of its approach. The locomotive was in charge of the fireman, the engineer being absent. The other persons employed with the deceased at work on the track stepped off, and some one called to him "look out," when he, instead of stepping back, stepped forward, and was struck and killed. The fireman and one brakeman were the only persons in charge of the train. *Held*, that these facts were sufficient to sustain a verdict in favor of the plaintiff.

The deceased should not, under such circumstances, be charged with negligence contributing to the injury if he might have seen the approach of the train by the exercise of reasonable care,—as by looking up,—and failed to do so; nor because he did not, when startled by its near approach, act as one not exposed to danger might think he ought to have done.

Appeal to the supreme court of Indiana from the court of common pleas of Marion county.

This was an action by Carr, as administrator of

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Patrick Gill, deceased, to recover damages from the Indianapolis, Bloomington, & Western Railway Company for negligently causing the death of the plaintiff's intestate. The facts are stated in the opinion. The jury found a verdict for the plaintiff. The defendant moved for a new trial, but the motion was overruled, and the defendant excepted. Judgment was entered for the plaintiff upon the verdict. From the judgment the defendant appealed.

J. E. McDonald, J. M. Butler, and E. McDonald,
for the appellant.

J. Hanna, and F. Knefler, for the appellee.

DOWNNEY, Ch. J.—This action was brought by the appellee against the appellant, and it was alleged in the complaint that the Indianapolis, Crawfordsville, & Danville Railroad Company was, on September 20, 1869, using, operating, and running a certain locomotive, together with a train of cars thereto attached, on the Union track, in the city of Indianapolis, Indiana, at a point on or near Delaware street, in said city; and that since said September 20, 1869, said Indianapolis, Crawfordsville, & Danville Railroad Company had consolidated and entered into articles of consolidation with the Danville, Urbana, Bloomington, and Pekin Railroad Company, whereby said two corporations had become one corporation, known by the name, style, and description of the defendant herein, and by means thereof, said defendant had succeeded to all the rights and franchises of both of said corporations, and also become responsible for all the liabilities before then existing or accrued against either and both of said corporations. And that on the said September 20, 1869, Patrick Gill, then in life, was in the service, and was performing work and labor as an

employe of the Union Railway Company, and was on said day engaged at his daily labor on said Union track, at a point on and near Delaware street, in the city of Indianapolis ; and that while so at work, and without any fault or negligence on his part, the agents and servants of the said Indianapolis, Crawfordsville, and Danville Railroad Company, while engaged in running and operating a locomotive and train of cars owned by and belonging to said Indianapolis, Crawfordsville, and Danville Railroad Company, on, upon, and along said Union track, so carelessly and negligently run and operated said locomotive and train, on, over, and along said track, that they did carelessly and negligently run said locomotive and cars against, on, and upon him, the said Patrick Gill ; by means whereof he, the said Patrick Gill, was then and there instantly killed. And plaintiff says that said Patrick Gill left surviving him his widow, Bridget Gill, and no children ; that the said Bridget was wholly dependent upon him the said Patrick, for means of support ; and that by means of the provisions of the statute in such case made and provided, a right of action had accrued in favor of the plaintiff for the sole use and benefit of her, said Bridget Gill, as the surviving widow of said Patrick Gill, to have and recover the sum of five thousand dollars ; and that said defendant, by reason of the consolidation aforesaid, was liable and responsible for the same ; and that he, said plaintiff, for the use aforesaid, had a right of action against said defendant, by reason of the premises, for said sum of five thousand dollars ; and he, for the use aforesaid, demanded judgment for said amount.

A demurrer to this complaint was filed and overruled, of which action there is no complaint. Issue in fact was then formed by a traverse of the complaint. The case was tried by a jury, and a verdict rendered for the plaintiff for nine hundred and fifty dollars.

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A motion for a new trial was made by the defendant, for the reasons, that the verdict was not sustained by sufficient evidence, was contrary to law, and because the court refused to give instruction No. 5, asked by the defendant. This motion was overruled, the defendant excepted, judgment was rendered, and thirty days were given in which to file the bill of exceptions. The bill of exceptions was filed within the time limited, and professes to set out all the evidence given in the case.

The only error assigned is the refusal of the court to grant the new trial.

It appears from the evidence that Gill and others were at work repairing the Union track, but the repairs were such as did not prevent trains from passing over the road at that point. The train in question was backing. Those who were working with Gill got out of the way. He was standing on or near the south rail at work. The bell of the locomotive was ringing. There were four or five cars in the train. Some one called out, "Look out," when Gill, instead of stepping back, for some cause stepped forward on the track, and was struck by the cars, knocked down, and some of the cars passed over him, killing him almost immediately. A brakeman was on the rear end of the car furthest from the locomotive, but the brake on that car was out of order. The engine was at the other end of the train, and there does not appear to have been any means of communicating with the engineer, so as to stop the train or prevent accidents. No one went in front of the backing train to warn persons of danger or to clear the way. The engineer had left his engine, and gone to get a drink, leaving the engine in the hands of the fireman, who had charge of it at the time of the accident. He was not an engineer. The fireman and one brakeman were all the men on the train at the time of the accident.

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We would not be warranted, in this state of facts, to say that the evidence was not sufficient to justify the verdict of the jury.

The instruction asked and refused was as follows :
“ 5. If, at the time the deceased was killed, it was his duty to be engaged upon the track at that place, and he might have seen the approach of the train by exercise of reasonable care, as by looking up, then the failing to do so, if he did so fail, was negligence on his part, and if such negligence contributed to the injury, then the jury should find for the defendant.”

We think this instruction was correctly refused. It asserts that if the deceased might have seen the train by looking up, it was his duty to do so ; and if he failed to look up, he was guilty of negligence, and the action could not be sustained. The evidence shows that the deceased did look up, but we think it most probable that when he did so, the train was so close upon him that in the confusion of the moment he stepped in the wrong direction, and thereby lost his life. He is not to be charged with negligence because he did not, when suddenly startled by the cry of danger, or by the near approach of the train, do exactly what one not exposed to such peril might think he might or ought to have done. When a train is moving forward in the ordinary way, with the locomotive in front, a skillful and careful engineer, with a competent number of brakemen and other assistants, the train moving at the rate of only three or four miles an hour, as was the case here, there can not be much danger to life, even in passing through or across the streets of a populous city. But when the train is backing, at a point where people are passing and engaged in work on the track of the road, the engine, as in this case, being at the rear end of the train as then moving, common prudence and ordinary care would seem to require more diligence to avoid damage to persons and prop-

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erty than was used in this case. The engineer was off his train. There was only one brakeman. The brake or brakes were out of order. There was no means of communicating with the engineer. No one passed ahead of the train to clear the track or give notice of danger. We think the charge was rightly refused.

The judgment is affirmed, with costs, and five per cent. damages.

THE WASHINGTON & GEORGETOWN RAIL-
WAY COMPANY v. GLADMON.

15 Wallace, 401.

*Supreme Court of the United States; December Term,
1872.*

Damages for injury to child crossing track. Contributive negligence.

In an action to recover damages for injuries received by a child of tender years from the car of a street railway company, while crossing the track, the rule of law as to the defense of contributive negligence is quite different from the rule in cases of injuries to adults. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child; and is to be determined in each case by the circumstances of that case.

Trial. Instructions to jury. A request by counsel for an instruction to the jury which assumes as existing facts not proved should not be granted.

Washington, &c. R. Co. v. Gladmon.

Error from the supreme court of the United States to the supreme court of the District of Columbia.

This was an action against the Washington & Georgetown Railway Company by Gladmon, to recover damages for injuries to his child by the car and horses of the company. Gladmon sued as next friend of the child, who was seven years of age at the time the injury was received.

Upon the trial, the evidence tended strongly to show that the injury resulted from negligence of the defendant's driver. Certain instructions to the jury asked for by the defendant and refused by the court, are stated or referred to in the opinion. The defendant excepted to this refusal, as also to certain portions of the charge actually given by the court. The jury found a verdict for the plaintiff, and judgment against the defendant was entered thereupon. To review the judgment the defendant prosecuted this writ of error.

J. P. Bradley, and *J. P. Bradley, Jr.*, for the plaintiff in error.

R. T. Merrick, and *W. F. Mattingly*, for the defendant in error.

HUNT, J.—Sufficient proof was given to establish the negligence of the driver of the car, and no point is raised on that branch of the case.

The alleged errors arise from refusals to give certain instructions upon the effect of the conduct of the child, and of the charge as actually made on that subject. The first prayer for instructions is stated in the record in the words following:

"If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an

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agent of defendants, the burden of proof is on the plaintiff to show affirmatively, not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident, or even contributed to it, or that it could have been avoided by the exercise of due care on his own part, then the plaintiff is not entitled to recover, whether the driver of the car was guilty of negligence or not, but the jury must find for defendant."

As applied to adult parties, the first branch of this proposition is not correct. While it is true that the absence of reasonable care and caution, on the part of one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care, or contributory negligence, as it is termed, is a defense to be proved by the other side.

The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff. *Oldfield v. New York, &c. R. R. Co.*, 3 *E. D. Smith*, (N. Y.) 103; affirmed 14 *N. Y.* 310; *Johnson v. Hudson River R. R. Co.*, 20 *Id.* 65; *Button v. Same*, 18 *Id.* 248; *Wilds v. Same*, 24 *Id.* 430. In the case of *Oldfield v. New York, &c. R. R. Co.*, DENIO, J., says:

"I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct, on the occasion of the injury, was cautious and prudent. The *onus probandi*,

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in this as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. . . . The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration."

The later cases in the New York court of appeals I think will show that the trials have almost uniformly proceeded upon the theory that the plaintiff is not bound to prove affirmatively that he was himself free from negligence, and this theory has been accepted as the true one. Generally, as here, the proof which shows the defendant's negligence, shows also the negligence or the caution of the plaintiff. The question of the burden of proof is, therefore, not usually presented with prominence. In some of the states it has been held that the plaintiff was bound to make affirmative proof of his freedom from negligence. In many cases it is so held by virtue of local statutes. *Sherman & Redfield on Negligence*, §§ 43 and 44, and note where the cases are collected.

There is, however, another and very satisfactory reason for the refusal to comply with the prayer. The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender

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years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and can not be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. *Sherman & Redfield on Negligence*, § 49; *Mangam v. Brooklyn City Railroad*, 38 *N. Y.* 455; *O'Mara v. Hudson River R. R. Co.*, *Id.* 445; *Smith v. O'Connor*, 48 *Pa. St.* 218; *Pennsylvania R. R. v. McTighe*, 16 *Id.* 316.

The rule laid down in the request under consideration entirely ignores this difference. Assuming that it would have been a sound rule if the plaintiff had been an adult, it is evident that the jury would not have been justified in applying it in this case. That "due care and caution" required of plaintiffs generally, was not required of the plaintiff here. If it had been given as requested, the instruction would have been quite certain to mislead the jury to the prejudice of the plaintiff. It was properly refused.

The instruction asked for in the second prayer, and which the judge refused to give, was as follows:

"2. If the jury find that the plaintiff negligently or rashly attempted to cross the street in front of the car, but his injuries resulted from his having accidentally slipped and fallen on or near the track when endeavoring to turn back when it was too late to stop the car, it is to be regarded as an inevitable accident, for the consequences of which the defendant is not responsible."

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The suggestions already made are applicable to this request. The circumstance that the plaintiff was an infant of tender years, and that a different rule was required in that case from the rule in the case of an adult, was excluded from the proposition. A charge in accordance with the prayer could not, therefore, have been properly made. The prayer also assumed as existing, facts of which no proof is found in the record. I do not find any evidence of the fact here assumed, that when the plaintiff slipped or fell, it was too late to stop the car. The evidence on that subject comes from the witness who testified in substance that if the driver had been attending to his duty he could have checked his horses in time. This witness gave the only evidence on the point. It is not allowable to assume as existing, facts not proved, and to ask a direction to the jury upon such assumption. This practice would tend to embarrass and mislead the jury.

The third and fourth prayers are of the same general character and do not require more particular consideration.

Exception is also taken to certain portions of the charge. The general scope and tendency of the charge is correct. The rule in regard to the liability of the defendant under the circumstances submitted to the jury is correctly given. The language is less simple, perhaps, than might have been desired, and detached sentences might be open to criticism, but upon the whole it is right, and the jury could not have failed to understand it correctly.

Some discussion was had upon the argument on the point of the degree of care and attention to be required of those having the charge and custody of an infant of tender years. This presents an interesting question, which, when it is properly before us, will receive the careful attention of the court. In the

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present case it does not appear to have been presented to the court below, and there is nothing in the evidence to justify this court in now considering it. Upon the case, as it comes before us, the judgment must be affirmed.

Judgment affirmed.

MAGINNIS v. THE NEW YORK CENTRAL &
HUDSON RIVER RAILROAD COMPANY.

52 *New York*, 215.

Court of Appeals of New York; February Term,
1873.

Negligence. Injury to person. Contributive negligence. Running a railway train backward through a public street in a city, in the night-time, without any light or warning at the rear of the train is negligence which will render the railway company liable for any injury resulting therefrom to a person crossing the track. And where the train has stopped or so nearly stopped as to appear, to one in the rear, to be standing still, starting the train backward from such actual or apparent rest without proper signal or warning, is also negligence on the part of the railway company. An attempt by a traveler under such circumstances, to cross the track in the rear of the train, is not, as matter of law, negligence contributing to the injury.

In an action against a railway company to recover damages for causing the death of a person, whose death had resulted from injuries received by being run over by the defendant's cars, the court charged the jury that if the deceased saw the train approaching, or failed to look in order to see if it was coming, she was herself guilty of negligence, and the plaintiff could not recover. The

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defendant requested the court to charge that if the deceased could, before placing herself on the track, have seen the approaching train, then her being on the track was, under the circumstances, conclusive evidence of contributory negligence on her part. The court declined to charge that this was "conclusive," but charged that it was high evidence. *Held*, that this charge was as favorable to the defendant as could be justified. The fact that the deceased could have seen "the approaching train" did not necessarily imply that she could have seen that it was approaching, and was not conclusive of negligence on her part.

A charge in such a case, that if the defendant's employes gave the train a sudden and undue impetus, this was evidence of negligence, — *Held*, correct; the fair import of the instruction being, that if the impetus given was improper, under the circumstances of want of light, signal, or warning, this was evidence of negligence.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action by Michael Madden, as administrator of Ann Madden, to recover damages from the New York Central & Hudson River Railroad Company for causing the death of the plaintiff's intestate by running the defendant's cars over her. Michael Madden, the original plaintiff, having deceased, John Maginnis was appointed administrator and substituted as plaintiff.

Upon the trial it appeared from the evidence that the deceased was killed while traveling on foot upon a public street in the city of Albany, by the defendant's train, which was backing down its track across the street. Before the deceased attempted to cross the railroad track, the train had so nearly stopped that no motion was perceptible; but just as she was crossing, the cars were started backward suddenly and struck and killed her. The night was not dark. There was no light at the rear end of the train, and no notice or warning of any kind was given that the

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train, which was standing still or nearly so, was about to move.

The defendant moved for a nonsuit, upon the ground that there was no evidence of negligence upon the part of the defendant, and that the negligence of the deceased contributed to the injury. The motion was denied, and the defendant excepted.

The defendant requested the court to charge: .

First. That if the jury believed that the deceased, before she reached the track, saw the train approaching, and notwithstanding this went upon the track, where she was hit by the car, she was chargeable with negligence and could not recover.

The court so charged.

Second. That if deceased went on the track without looking to see if the train was coming, that fact constituted negligence on her part, and she could not recover.

The court so charged.

Third. That if the jury believed that deceased could, before she placed herself on the track, have seen the approaching train by looking, then her being on the track where the train hit her was, under the circumstances of this case, conclusive evidence of contributory negligence on her part, and plaintiff could not recover, whether, in fact, deceased did look or not.

The court said: I so charge. I charge, not that it is negligence, but that it is evidence of negligence. I decline to charge that it is "conclusive" evidence; I will say it is high evidence. The defendant excepted to the refusal to charge that it was "conclusive" evidence.

Fourth. That, under the evidence in this case, it was immaterial whether or not there was a light on the rear car or whether the bell was rung or not.

The court refused so to charge. The defendant excepted.

Fifth. That the increase of speed was not negligence or any evidence of negligence.

The court said: I charge that if they believe the train was moving down at its accustomed speed, as it was wont to do, and was nearly stopped, then if they gave it a sudden impetus and an undue one, and the accident was occasioned by that means, I hold that is evidence of negligence; not that it is negligence, but evidence of negligence. The defendant excepted to the refusal to charge as requested, and to the charge as made.

Sixth. That there was no evidence in the case of any sudden or undue increase of speed in the train, before the deceased was hit by the rear car.

The court said: That is a question of fact. I do not think there is evidence to show at what rate the increase of speed was; but that is for the jury. And it is for the jury to determine whether the accident was before or after the increase of speed and letting on of steam. The defendant excepted to the refusal to charge as requested, and to the charge as made.

Seventh. That if the jury should believe that the train continued its motion from the time it commenced backing until the deceased was hit by the car, and that she could have seen the train, had she looked before she was hit, the plaintiff could not recover in the action, whether she did in fact look or not.

The court said: So charged, unless there was a sudden and undue increase of speed. The defendant excepted to the refusal and modification.

Eighth. That if the train was moving all the time until deceased was hit, it was negligence in her to go upon the track when she did go, and plaintiff can not recover.

The court said: I charge that with the same modification. The defendant excepted to the modification.

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Ninth. That there was no obligation on the part of the defendant to run the train at a uniform rate of speed, and that if the deceased went upon the track while the train was moving, supposing that its rate of speed would not be increased, and that she could therefore cross in safety, that was negligence on her part, and the plaintiff could not recover.

The court so charged.

The jury found a verdict in favor of the plaintiff. The defendant appealed to the general term, which set aside the verdict and ordered a new trial. From the order of the general term the plaintiff appealed to the court of appeals.

Amasa J. Parker, for the appellant.

Samuel Hand, for the respondent.

THE COURT.—When this case was before this court the first time, the judgment was reversed and a new trial granted for an error of the judge, in refusing to charge as requested upon a point not now material to be noticed; but we thought that the evidence was sufficient to go to the jury under the circumstances, and that the refusal to nonsuit was not error. The theory of liability was that if the train had stopped, or so nearly stopped as to appear to be standing still, it was not negligence for the deceased to cross the street; and that starting the cars in a backward motion from an actual or apparent rest, without proper signal or warning, was sufficient for the jury to predicate negligence of defendants as the cause of the injury. The last trial did not develop such a change of facts as to require a different decision. There was no fact established from which, as matter of law, we can impute negligence to the intestate, or which absolutely relieves the defendant from the imputation of negligence.

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The most that can be said is that the case of the plaintiff, which was not strong before, is a shade weaker now. The train did not probably come to a dead stop ; but it might be inferred that it was at the point of stopping, and that the intestate, in looking at it, was justified in supposing it to be standing still, and, consequently, justified in crossing the street ; and that, although there was no great suddenness to the motion, it was accelerated in order to pass Quackenbush-street ; and that the absence of a visible light, or other means of warning, at the rear end of the train while being backed through a public street of the city, constituted a sufficient fault on the part of the company to render them liable for the injury. We think the previous decision of the court requires us to hold that the refusal to nonsuit was not error.

We must, therefore, consider whether any error was committed by the judge in the refusals to charge as requested. The propositions contained in the first and second requests were charged as requested. They embrace the proper instructions as to the negligence of the deceased, and are, in substance, that if the deceased saw the train approaching, or failed to look in order to see if the train was coming, she was guilty of negligence and the plaintiff could not recover. The third request was that if the jury believed that deceased could, before going on the track, have seen the approaching train by looking, then her being on the track where the train hit her, under the circumstances of the case, was conclusive evidence of contributory negligence, and the plaintiff could not recover. The judge said at first "I so charge ;" and then added, "I charge, not that it is negligence, but evidence of negligence. I decline to charge that it is conclusive evidence. I will say it is high evidence." The propositions to the court were evidently prepared with critical care. The word "conclusive" evidence, in this

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request, means nothing more than that the facts stated constituted negligence in law, and the court was asked to so charge.

The first and second requests, which were charged, were that if deceased saw the train moving, or didn't look to see if it was coming, the plaintiff could not recover; and it is claimed by the counsel that this is substantially the same request, with the variation only, that if the deceased could have seen the train moving and went on the track she was guilty of negligence. If this is the proper construction of the request it is substantially embraced in the first two requests. If she could see the train moving, she either did see it, or did not look to see it. In either case, the court charged that the plaintiff could not recover. But the language of the request is that if the deceased could have seen the "approaching train," it was negligence to go on the track. It may be claimed, from the evidence, that the train was in fact approaching, though imperceptibly; and it is clear that deceased could have seen the train; but this does not reach the precise point requisite to establish her negligence, which was that she could see that the train was moving. To say that she could see the approaching train, is only saying that she could see the train which was in fact approaching; while, to say that she could see the train approaching, is to affirm the vital fact that she could see that the train was moving.

This distinction was recognized in our previous decision. The request, the refusal to charge which we held to be error, was that if the deceased saw the train approaching and went on the track she was guilty of negligence, and if she could see by looking that it was approaching, it would follow that she did see it moving, or did not look, which in either case would be negligence. The same distinction is made in the different requests to charge. We are to presume that

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the change in phraseology in this request was intentional. To give it the other construction it would involve the same principle which the court had distinctly charged in the first two requests, and it can not be supposed that the court intended to change its ruling. It is evident that neither court nor jury so understood it. Upon the construction here indicated the charge of the court was quite as favorable to the defendant as could be justified.

The fourth request was refused, that it was immaterial whether the bell was rung, or whether there was a light at the rear end of the car. If this request was based upon the idea that there was conclusive evidence of the negligence of deceased, it can not, as we have seen, be sustained. As to the ringing of the bell, there was no evidence entitled to consideration in conflict with that of the fireman and engineer as to the fact whether the bell was rung or not. But the absence of a light or other proper signal or warning at the rear end of the car was material, upon the question of the defendant's negligence, and also as explanatory of the conduct of the deceased. The running of a train backward through a public street of a city in the night, without light, signal, or warning at the rear end of the train, at any rate of speed, is evidence upon the question of negligence, and the location and sufficiency of the light on this train was properly left to the jury.

The fifth request and charge relate to the negligence of the defendant. The request was that the rate of speed sworn to by a particular witness was not evidence of negligence. The response of the court was that if they gave the train a sudden and undue impetus, it was evidence of negligence. There was no claim on the trial that the rate of speed *per se* was evidence of negligence, nor did the court intend so to charge. The fair import of this instruction is, that if

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the impetus or motion given to this train was, under the circumstances of warning or signal, undue or improper, it was evidence of negligence. It would be a strained construction to hold that the judge intended to charge, that if proper signal and warning were given, indicating that the train was moving backwards, any speed proved on the trial would constitute negligence.

It would have been more satisfactory if the learned judge had explained what was meant by "undue impetus," but we are required to give the charge such a construction as will sustain the ruling, if we are satisfied that the jury could not be misled.

The sixth request was that there was no evidence of any sudden or undue increase of speed before the deceased was hit. The court responded that this was a question of fact, and stated that there was no evidence of the rate of increase. This was not error. The propriety of the application of the word "sudden" depended upon the construction of the evidence, and "undue" upon all the circumstances. These were questions of fact, as also whether the movement took place before the deceased was hit or not.

The seventh request was that if the train continued its motion all the way from the Union depot to where deceased was hit, and she could have seen the train, the plaintiff could not recover. The court so charged, "unless there was a sudden and undue increase of speed." This request is subject to the same criticism as the third request. It seeks to predicate negligence upon the ability of deceased to see the train, and ignores the vital circumstance that she saw, or could have seen, that it was in motion.

The eighth request lacks the same element of fact to make it conclusive of negligence against the deceased.

The ninth request assumes that the deceased saw

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the train moving, and asks the court to charge that if she went upon the track supposing that the rate of speed would not be increased, and that she could therefore cross in safety, it was negligence, and the plaintiff could not recover, and the court properly so charged. This charge, together with the first and second requests which were also charged, threw light upon other portions of the charge which, standing alone, might appear ambiguous. The court clearly held that if the deceased saw or could have seen that the train was in motion, it was negligence for her to cross so near the train as to be hit, although the motion of the train may have been accelerated suddenly or otherwise, and although the defendant may have been negligent in not having or giving a proper light or warning. We feel constrained, therefore, to reverse the order of the general term, and affirm judgment for plaintiff on verdict.

All concurred.

Order reversed. Judgment for plaintiff.

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WARNER v. THE NEW YORK CENTRAL RAIL-
ROAD COMPANY.

52 *New York*, 487.

Court of Appeals of New York; April Term, 1873.

Negligence. Injury to person. Trial. In an action to recover damages from a railway company for injuries to the person of the plaintiff resulting from being struck by the defendant's train, if there is a conflict of evidence as to whether any signals of the approach of the train were given by the defendant, the question is properly one for the jury, and not for the court.

Trial. Verdict. Upon the bringing in of a sealed verdict by a jury, the entry made by the clerk in his book of minutes is not such a recording as renders the verdict unalterable. Where a jury, authorized so to do, brought in a sealed verdict in favor of the plaintiff, which was entered upon the clerk's minutes, but upon polling them they did not agree, the court directed them to return to their room. They retired, but came in again for instructions as to whether they could increase the verdict. The court instructed them that they might render such verdict as they thought proper, whereupon they brought in a verdict for the plaintiff for a larger amount. *Held*, that this was not error for which the verdict should be set aside.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action by Daniel Warner to recover damages from the New York Central Railroad Company for personal injuries sustained by the plaintiff, by being struck and thrown from his carriage by the defendant's train. The facts relating to the questions decided are stated in the opinion. The jury found a

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verdict for the plaintiff. From the judgment in favor of the plaintiff entered upon their verdict, the defendant appealed to the general term, which affirmed the judgment. From the judgment of the general term the defendant appealed to the court of appeals.

A. P. Laning, for the appellant.

J. H. Martindale, for the respondent.

FOLGER, J.—The defendant's motion that the court direct the jury to find a verdict for the defendant was properly denied.

There was a conflict in the testimony whether or not the whistle was blown at all, or the bell rung, over the distance from the crossing prescribed by the statute.

Both the plaintiff and his son testified positively in the negative, and their testimony had some support from that of Mrs. Smalley to the same effect; and that there was no bell rung, from that of the witness, Hinckey.

The engineer and fireman both testified positively in the affirmative as to the ringing of the bell over the requisite distance, and to the blowing of the whistle, and their testimony had some support from that of Hinckey, as to the blowing of the whistle.

But which of these classes of witnesses was to be believed; how much the circumstances of the accident added to or detracted from their testimony; how much the reasons given by each for certainty of recollection strengthened or weakened it; these considerations were for the jury alone.

There was not a case presented in which it was for the court to say that the evidence was so clear, that as a legal conclusion there was not shown to be negligence on the part of the defendant, or that there was

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shown to be contributory negligence on the part of the plaintiff. If the witnesses of the plaintiff were to be believed in preference to those of the defendant, then there was negligence on the part of the defendant, without contributory negligence on the part of the plaintiff. The determination of that question was peculiarly for the jury. It was fairly submitted to the jury by the charge of the court. It was not error so to do. *Labar v. Koplin*, 4 *N. Y.* 547.

The case of *Fordham v. Smith*, 46 *N. Y.* 683, cited by the defendant, is plainly distinguishable from this.

The case was delivered to the jury late at night, with permission to bring in a sealed verdict in the morning if before that time one had been agreed upon. The jury did agree upon a verdict, reduced it to writing, sealed it, and separated. When it was produced in court on the next day, it was for the plaintiff for six thousand dollars. It was so entered (as the appeal book states it), "on the record of the court." But the foreman of the jury explained that the verdict should bear interest from the date of the former judgment. To this the defendant objected. The plaintiff then polled the jury; and they not agreeing were directed by the court to retire to their room; to which direction the defendant excepted. The jury afterward came into court for instructions, asking if they could increase the damages above six thousand dollars, if they did not add the interest. The court directed them that they had not as yet agreed upon any verdict which was conclusive, and that they might decide upon any verdict in the case to which they all agreed; and directed them again to retire to their room. To this the defendant excepted. The jury afterward brought in a verdict for the plaintiff for seven thousand dollars.

Upon this state of the facts, the defendant insists

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that there was error. There is no doubt that, at this day, it is not erroneous to permit the jury to separate from time to time during the progress of the trial, and before the case has been finally submitted to them; nor to permit them, when the parties assent and circumstances require it, to agree to a verdict, to reduce it to writing, to sign it, to seal it, to separate, to reassemble themselves together, and to bring the sealed verdict into court at the opening thereof next thereafter.

Nor is there any doubt of the right of either party to poll the jury, on the rendition of a verdict by the foreman, at any time before it is recorded. *Fox v. Smith*, 3 *Cow.* (N. Y.) 23; *People v. Goodwin*, 18 *Johns.* (N. Y.) 188; and this although the verdict has been a sealed one, and the jury have separated before bringing it in; unless the right to poll has been expressly waived. *Bunn v. Hoyt*, 3 *Johns.* (N. Y.) 255; 3 *Cow.* (N. Y.) *supra*; *Jackson v. Hawkes*, 2 *Wend.* (N. Y.) 619; *Root v. Sherwood*, 6 *Johns.* (N. Y.) 68; 4 *N. Y. supra*.

There is no doubt but that a jury after giving in a verdict may, before it is recorded, be sent back to reconsider it; not only to correct a mistake in form, or to make that plain which was obscure, but to alter it in substance if they so determine and agree. *Blackley v. Sheldon*, 7 *Johns.* (N. Y.) 32; *Goodwin v. Appleton*, 22 *Me.* 453; *Sutliff v. Gilbert*, 8 *Ohio*, 405; *Wolpan v. Eyster*, 7 *Watts* (Pa.) 38.

And where a jury has been authorized to bring in a sealed verdict, and has found it, put it in writing, sealed it, has separated, has the next morning come together in court and given it in; if the verdict be defective, the court may direct them to retire again and reconsider it. *Tyrrell v. Lockhart*, 3 *Blackf.* (Ind.) 136; 8 *Ohio, supra*; 7 *Johns.* (N. Y.) *supra*.

And a witness may be re-examined before them, or

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the testimony as taken in manuscript read to them; or further instruction given to them by the court on some point of law not before made clear, or not before raised. *Henlow v. Leonard*, 7 *Johns.* (N. Y.) 200.

It will be observed that in the language above used, taken from the decisions in some of the cases cited, the expression occurs, "before the verdict is recorded;" and it will be noticed that the appeal book in this case states that the sealed verdict brought in by the jury "was entered on the record of the court."

We are aware, however, that all that took place which we are now considering was at *nisi prius*; that the court which tried and disposed for the occasion of this case, was a circuit court for the trial of issues of fact; and that the only record which it had, in which its clerk could make entries, was a book of rough minutes, into which was reduced in writing, in a comparatively hasty and temporary form, the different events of the trial in their order; thereafter, on the close and adjournment of the court, to become, by transcription into a more permanent form, a part of the records of the clerk's office of the county in which the trial was had, and so a part of the records of the supreme court of the state of New York. The clerk's book of rough minutes, kept by him on his desk at circuit, was that which gathered and retained the material, from which afterward the lasting record of the court was to be made, and doubtless was made.

We all know, from the often repetition of the scene before us, just what usually takes place on the rendition of a verdict of a jury, be it oral, or in writing as a sealed verdict. It is uttered by the foreman of the jury, or read by the clerk from the paper handed in by the jury. It is then entered upon the minutes. The clerk then calls upon the jury to listen to their verdict as it has been recorded by the court. Perhaps the more technically accurate phrase would be "en-

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tered in the minutes." But that is not the end. It is not yet finished and perfected. The clerk still further puts the query: "Gentlemen of the jury, is that your verdict?" And if there is no dissent made, he concludes: "So say you all." And acquiescence tacit, or by sound or sign following, and no question by the court or either party being made, the jury are discharged from the further consideration of that case. Then, the verdict becomes a fixed legal fact, and may not afterward be altered in form or substance by court or jury or officer. It may well be queried: Why, if the entering of the verdict in the minutes by the clerk is the consummation of the trial, should the jury be again by him called upon to listen to it as he has entered it, and to say that it is or that it is not their verdict? We have seen from the cases cited, that up to the last moment, all or any of the jury may dissent from the verdict as announced from the jury box in open court; and that either party may by a poll search the conscience and the will of each jurymen; and this interpellation of the clerk is the last solemn, formal act, challenging the attention of each member of the jury, on the instant before the verdict becomes irrevocable and unchangeable. Until that is made, and assent given, express or tacit, and the jury dismissed and become no more a jury in the case, the verdict within certain limits, not exceeded in this case, is within the power of the jury, and to a certain extent within the direction of the court.

And so it is laid down in the text books. See 3 *Robinson Cr. Prac.* 268, as cited in 3 *Graham & Waterman on New Trials*, 1408, note; 1 *Chit. Cr. Law*, 635, 636; 1 *Bishop Cr. Pro.* § 829.

And so it is declared in the cases. In *Regina v. Vodden*, 22 *Eng. Law & Eq.* 596, on a trial of a prisoner for felony, a jurymen by mistake delivered the verdict as "not guilty," when the jury meant "guilty,"

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which verdict of not guilty was entered by the clerk of the peace on his minutes, and by the chairman of the sessions in his note-book. The prisoner was thereupon discharged out of the dock. Others of the jury interfered and said the verdict was guilty. The prisoner was brought back into the dock, and the jury asked what their verdict was, and all the twelve answered that they had been unanimous for a verdict of guilty. And a verdict of guilty was directed to be recorded, and the prisoner was sentenced. On review, the conviction was sustained. PARKE, B., said that a verdict is not recorded until it is put upon parchment; and that recording the verdict, means recording the verdict to which the jury have agreed. And POLLOCK, C. B., stated that the form used to be: "Gentlemen of the jury, listen to your verdict *while* the court records it. You say that the prisoner is not guilty; and that is the verdict of you all." And in *Rex v. Parkin*, 1 *Moody Crown Cas. Res.* 45, it was held that the mere entry of the verdict by the clerk in his book does not necessarily constitute a final recording of it. See, also, *Rex v. Justices of Suffolk*, 5 *Nev. & M.* 139; *Regina v. Meeny*, 1 *Leigh & C.* 213-216; S. C., 9 *Cox Crim. Cas.* 231; *McGregg v. State*, 4 *Blackf. (Ind.)* 101; *Waters v. Jenkins*, 16 *Serg. & R. (Pa.)* 414.

In *Ward v. Bailey*, 23 *Me.*, the jury had rendered a verdict, and "it had been received and entered on the docket." But on questioning the foreman, it appeared that the jury had misconceived the meaning of the terms used in their verdict. They were permitted to correct the mistake, and the minutes of the clerk were altered accordingly. And on review this was held to be no error.

The fact that the verdict has been announced, and has been as announced entered in the minutes of the clerk, is not that recording which makes the announce-

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ment and the clerical act the fixed and unalterable verdict of the jury.

The true rule is laid down in the opinion in 16 *Serg. & R.*, *supra*, that after the verdict has been received and entered upon the minutes, and the jury has been dismissed, they have not the power to be reassembled and alter their verdict. And see *Sargent v. State*, 11 *Ohio*, 472.

Before they have been dismissed from their relation to the case as jurors in it, their power over their verdict remains, and their right to alter it so as to conform to their real and unanimous intention and purpose.

We perceive no error done at the circuit in the conduct of the court and jury.

It is evident, from the statement in the appeal book, that the jury or some of them meant to award to the plaintiff more than the sum of six thousand dollars, which was the whole amount mentioned in the sealed verdict. The foreman expressed this intention, when he said that the verdict (the six thousand dollars) should bear interest from the date of the former judgment, which, as may be inferred from the charge, had been rendered in the case in favor of the plaintiff, and had been set aside, and this new trial ordered. When the jury on the demand of the plaintiff were polled, and were found not to then agree to the finding as contained in the sealed verdict, or as explained by the foreman, it was the duty of the court to send them to their room to reconsider, and agree if might be. It was the privilege of the jury to come again into court and ask instruction. The court committed no error in the fact of giving instruction, nor in the particular instruction given. There had been as yet no conclusive verdict rendered; they had still to agree on a verdict. The verdict to which they at the last agreed corresponded with the finding in the sealed

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paper, in that it was for damages for the plaintiff. It fell short of the amount which would have followed from adherence to the statement of the foreman. It was not by far so complete a variance as that of guilty instead of not guilty on an indictment for a felony, nor greater than in some other of the cases hereinbefore cited.

There is nothing to show that harm came to the defendant from all that transpired.

The judgment appealed from should be affirmed, with costs to the respondent.

CHURCH, Ch. J., did not sit.

Others concurred.

Judgment affirmed.

EATON v. THE ERIE RAILWAY COMPANY.

51 New York, 544.

Commission of Appeals of New York; March Term, 1873.

Negligence. Injury to traveler. Contributive negligence. Merely sounding the whistle of the locomotive,—*Held*, not notice of an intended backward movement of a railway train sufficient to absolve the railway company from liability for negligence, where the train was a freight train nearly one thousand feet long, and had been standing in and obstructing a street in a city for a considerable time, yet leaving a narrow space for passage across the track immediately in the rear of the train.

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In an action to recover from a railway company damages for injuries to the plaintiff's horse, wagon, and other property, the evidence showed that while the defendant's train was standing upon its track partly across a city street, the plaintiff, traveling upon the street with his horse and wagon, and desiring to pass in the rear of the train, asked a man who had got off the train, but who did not appear to be in defendant's employ, if he could pass. He was advised not to do so, as the train might back at any time. Plaintiff waited a few minutes and then attempted to lead his horse across the track in the rear of the train, when the train moved backward, struck and injured the horse, wagon, &c. *Held*, that this was not contributory negligence on the part of the plaintiff as matter of law, but the question was one of fact for the jury.

Appeal to the commission of appeals of New York from the general term of the supreme court in the sixth judicial district.

This was an action by Abel Eaton to recover damages from the Erie Railway Company for injury to the plaintiff's property, caused by a collision with the defendant's train.

Upon the trial, the evidence showed that the collision occurred while the plaintiff was passing, with his horse and wagon, across defendant's track in a public street in the city of Elmira, in which defendant's cars were standing, leaving space enough between the rear car of the train and the sidewalk to allow the horse and wagon to pass. The train backed up as the plaintiff was leading his horse, with the wagon, across the track, and injured the horse and wagon, with its contents. The evidence on the part of the plaintiff tended to show that neither the bell was rung nor the whistle was blown before the train started. On the part of the defendant, the conductor and engineer of the train testified that the whistle was blown before the train was started backward. The defendant also proved, by one Deyo, who had temporarily got off the train at the time, that he cautioned the plaintiff about passing over

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the track, and advised him not to undertake it, as the train might back up at any time. The plaintiff, after waiting a few minutes, said, "I guess I will try it," and then went on.

The defendant requested the court to instruct the jury that "if the defendant caused the whistle to be sounded, as testified by the conductor and engineer, and the plaintiff was advised, as testified by Deyo, not to pass, then the defendant is not liable." The court refused to so instruct the jury. The defendant excepted to this refusal.

The jury rendered a verdict in favor of the plaintiff. Exceptions were directed to be heard in the first instance at general term, and the entry of judgment was in the mean time suspended. The defendant made a case, containing exceptions, and moved for a new trial at special term which was denied. He appealed to the general term from the order denying the motion for a new trial. The general term affirmed the order of the special term, and ordered judgment for the plaintiff, with costs. Judgment was entered accordingly, and from this judgment the defendant appealed to the commission of appeals.

John Ganson, for the appellant.

S. B. Tomlinson, for the respondent.

LORT, Ch. Com.—It is claimed by the respondent's counsel that an appeal will not lie from the judgment entered in this action, on the ground, as he says, "that it is not an actual determination made at the general term." In this he is mistaken. The judge, who tried the cause, directed that the exceptions which were taken on the trial should be heard in the first instance at the general term, and that judgment be in the mean time suspended. The counsel for the defend-

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ant, however, made a case containing the exceptions, and thereupon moved for a new trial at special term, which was denied, and he then appealed from the order of denial to the general term, who, after hearing the appeal, affirmed the said order and also ordered judgment for the plaintiff on his verdict, with costs. That is the only judgment rendered. There probably was an irregularity in hearing the exceptions at special term, after the direction to hear them in the first instance at general term; but the entry of judgment was nevertheless stayed until the hearing and decision at general term, and there was an actual determination made by it, and the appeal is taken from the judgment founded and entered thereon. There is, consequently, no ground for the dismissal of the appeal. See *Caughey v. Smith*, 47 N. Y. 244.

It then becomes necessary to consider whether the court erred in refusing to charge the jury in reference to the defendant's liability, as requested by its counsel. That request involved two questions. The first affected the allegation of negligence by the defendant, and the other that of contributory negligence or fault of the plaintiff. They will be examined in that order.

The case shows that the defendant backed its train of cars so as to come into collision with the plaintiff's horse and wagon, which were crossing the railroad tracks of the defendant laid in a public street in the city of Elmira. It is not claimed that any other notice had been given of the backward movement of the train than the sounding of the whistle on the locomotive, by which it was propelled or moved, and the request assumes that none other was necessary. That assumption is evidently based on a mistake relative to the requirement of the statute (chapter 282 of the *Laws of 1854*), which imposes the duty of every steam railroad company, on the approach of its train to a traveled public road or street, to ring a bell or sound a

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steam whistle at the distance, at least, of eighty yards from the place where it is to be crossed, as therein specially provided. The provision in reference to the subject is contained in section 7 of the law. It first provides for the ringing of a bell, and then, as an alternative, the sounding of such a whistle, except in cities. It is thus made incumbent in *all* cases to ring a bell in crossing such a road or street in a city, and such ringing can not be dispensed with. The conductor on the train in question said that "the bell was not rung." There was, therefore, a failure to comply with the duty imposed by the statute. If, however, it be assumed that it had been complied with, that fact alone would not have absolved the defendant from the charge of negligence. The bell was nearly, if not quite, one thousand feet distant, and perhaps even at a greater distance from the end of the train; and one of the defendant's witnesses (Deyo), who was at or toward the end, swore that, although he heard a whistle on the occasion, he could not say whether it was that on the train in question, "because there was so many whistling at the time," having reference to other trains; adding, it is true, as another reason, that he "was setting the brake at the time." There was other evidence, on the part of the defendant, tending to show that it could not be distinguished from which train the sound of the whistle which was heard came; and the plaintiff and the witnesses introduced by him testified that no signal whatever was given to indicate or give notice of the movement of the train. It was, moreover, fairly inferable from the testimony that there was no conductor, flagman, or other person charged with the duty of warning or in any way notifying travelers not to pass behind the train. It had been standing in the street and obstructing the usual passage over it for a considerable time, and it would seem to have been proper for the defendant to have

provided some other means to apprise the public that it was to start, either forward or backward, than the ringing of a bell or sounding a whistle at so remote a point from the place of danger, and that such notice should have been given sufficiently long before such movement was in fact made to have notified the plaintiff before he attempted to cross the track of its impropriety and the risks he would encounter. To give him that notice after he had gone partly over, and when to recede was as dangerous as to go ahead, was not sufficient, and indeed useless under the circumstances. At all events the case, as presented by the evidence, was not such as to have justified the court in instructing the jury that the defendant was not in fault, and that it had discharged its duty by sounding the whistle and could not be held chargeable on the ground of negligence.

It now remains to be considered whether the plaintiff, by passing on to the track of the defendant, after the caution given by the witness Deyo, referred to in the request, was guilty of such contributory negligence as to absolve the defendant from all liability for the damages he sustained.

I do not agree with the counsel of the plaintiff, that the omission by the defendant of the signal required by law to be given "gave assurance to the plaintiff that the train would not run, especially backward, so as to interfere with his crossing, and that he had a right to rely on such assurance without incurring the imputation of breach of duty to a wrong-doer;" and that "he had a right to assume that the crossing was safe." Such omission did not absolve him from the duty and obligation of exercising proper care on his part to avoid a collision, as is fully established by the doctrine or principle of the decision in *Havens v. Erie R. Co.*, 41 *N. Y.* 296; and I deem it not inappropriate here, in citing that authority, to say that such

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rule had been previously acted on by me on trials at the circuit, although I dissented from the majority of the court in that case, in reversing the judgment and ordering a new trial thereon. Such dissent was not on the ground (as is inferable from the head note) that I did not approve of or concur in that doctrine or principle, but, as appears from my dissenting opinion, because I did not consider the question raised by the exceptions, which were taken—not to the charge which had laid down a contrary rule—but to the refusal of the court to charge on certain other and different specific propositions or requests particularly set forth.

The portion of the request now under review related to the testimony of a single witness (the said Deyo), and to a specific part of that only. It, therefore, becomes material to refer to it with some particularity. It appears from his statement that he was, at the time of the trial in April, 1867, eighteen years of age; that he resided at Binghamton, where his "folks" had lived three or four years, but he himself had not been there all the time, and that he had been going to school the previous winter; that he had come on the train in question on the day of the accident (April 7, 1865), from Susquehanna to Elmira; that he there got off and stood on the ground, and, after the train had been standing there some ten or fifteen minutes, his interview with the plaintiff took place; and, in speaking of it on his direct examination, he testified as follows: "This man asked me if I thought he could pass there, and I told him he better not, as the train might back at any time; I told him he could pass there, but better not; I meant there was room for him to pass; he asked me if I thought he could pass; I told him he might pass, but he had better not, as they might start at any time." He then, on being cross-examined, said "he asked if he could pass; I told him he might, but

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that he better not ; that was all, except that he said, a few moments after, 'I guess I will try it ;' I did not say anything ;" and, on a re-direct examination, he further said : "I think it a couple of minutes ; it was a very short time after I told him he better not that he started." This is all that was said between the plaintiff and this witness. He does not state nor do I find anything to show that he was in the employment of the defendant in any particular position or at all ; or that he was in any way charged with the duty of notifying the public or travelers in relation to passing over the railroad track ; nor was there anything done when that conversation took place from which the plaintiff could infer that the witness had any connection with the road. On the contrary, he said that there was at the time "a number of men there (some carpenters) building sidewalk ;" and it is not shown that he was acting in such a way as to inform the plaintiff, who he said was loading provisions at the time, that he was other than a bystander. The only facts stated by him to raise an inference that he was in any way connected with the road was that he came on the train from Susquehanna to Elmira, as above stated ; that he "set the brake on the caboose" (which I infer was the last car on the train) "as tight as he could ;" that he "was the one left to flag the train," evidently referring to another train in the rear, which he "could see two or three miles ;" but it does not appear that he used a flag or had any ; and that he "was setting the brake" at the time he heard a whistle, which has been referred to in speaking of his testimony on that question. None of these facts were, however, known to the plaintiff.

This extended reference to the circumstances under which the advice or caution of that witness, to which reference is made in the request, was given, shows that his residence, age, education, and employment at

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the time, conceding them to be sufficient to have qualified him to inform the plaintiff that "the train might back at any time," and to have entitled his opinion, as to the expediency of passing over the track, to some consideration and respect, fail to establish the fact conclusively and indisputably that the plaintiff acted rashly, or that he, by his own fault or negligence, contributed to the damage sustained by him. So far as appears, the witness was a mere volunteer in doing what he did to the brake, and had no better means of speaking about the movement of the train than any of the other persons who were present on the occasion. The plaintiff did in fact wait a few minutes after the advice was given (during which time he could have passed over and have been out of danger) before he started; and there did not then seem to be any more signs or indication of its movement than there was when the plaintiff first made the inquiry.

The notice from the young man was not that the train would move backward, or that it would be done at once, but that it might do so at some indefinite time. The plaintiff nevertheless heeded it. He did not start for at least two minutes afterward. During that time he could have passed over the track in safety. The result showed that he waited too long. If he is to be charged with contributive negligence for attempting to cross when he did, it may be asked how much longer he was bound to wait, without further warning, to be relieved from that charge? The longer he waited, the more likely, it is true, was it that the train would move, and yet such movement might have been delayed for an hour, and indeed during the remainder of the day. Was he bound to submit to such an interruption in the use of the highway? I think not. He had a right to expect that some previous warning would be given that the train was about to back, to put him in fault, and the warning should

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have been such as to have given him an opportunity to have got off the track after he had started to cross it. Instead of this, the fair inference from the evidence is that it began to move as soon as the whistle was sounded.

It is well said by the plaintiff's counsel, in the points submitted to us by him, that "the measure of precaution which prudence suggests is in due proportion to the probability of danger." That, in this case, was a fact proper to be determined by a jury, under and in view of all the surrounding circumstances, and not a question on which the court could properly have instructed them as requested. Such instruction, as the judge said in answer to the request, would be taking the case from them, and deciding it himself.

It follows, from the views above expressed, that there was no error in the refusal to charge in compliance with it. They also show that a nonsuit would have been improper, and that the plaintiff was entitled to have all the facts submitted to a jury, for them to determine on the questions of the relative negligence and fault of the respective parties, and by which that of the defendant's liability was to be governed.

It is proper to notice in conclusion that the counsel of the appellant has not made any point in reference to certain exceptions that were taken on the admissibility of evidence. It might be assumed, therefore, that they have been abandoned. They have nevertheless been examined, and none are well taken, or at all events available as a ground for the reversal of the judgment.

It must consequently be affirmed, with costs.

GRAY, Com., did not vote.

Others concurred.

Judgment affirmed.

Toledo, &c. R. Co. v. Pineo.

THE TOLEDO, PEORIA, & WARSAW RAILWAY
COMPANY v. PINEO.

56 *Illinois*, 308.

Supreme Court of Illinois; September Term, 1870.

Negligence. Injury to cattle. Evidence. In an action against a railroad company, to recover the value of a cow alleged to have been killed by the defendant's negligence, the plaintiff testified that he found the body of the animal the day after she was injured in a field, about twenty or thirty feet from the track, and there were marks on the track indicating such an accident. Another witness saw the cow in the same situation soon after a train had passed; and an employe of the company testified that while riding on the engine he saw a cow thrown from the track at about the same place, during the month the cow was found dead. *Held*, that this evidence was sufficient to connect the company with the injury, and a verdict for the plaintiff should be sustained.

Appeal to the supreme court of Illinois from the circuit court of Iroquois county.

This was an action by George Pineo against the Toledo, Peoria, & Warsaw Railway Company, to recover the value of a cow belonging to the plaintiff, alleged to have been killed on the defendant's road.

Upon the trial, the plaintiff testified, that in October, 1868, he had a cow killed on the railroad, about two miles west of Sheldon, in Iroquois county, Illinois. The cow was worth thirty dollars; did not see the cow when she received the injury; the cow was running out at the time upon the commons; the cow appeared to have been struck by a train going west, just east of

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where a fence crossed the track north and south ; there was a culvert across the road there ; there were some marks on the track, some hair on the culvert, which looked like she had been hit on the outside and knocked inside ; there was no public road crossing where the cow was killed ; there was one one-half or three-quarters of a mile east of where she was killed ; there were no cattle guards at the crossing on the sides of the public road ; the railroad was not fenced between the place where the cow was killed and the road crossing east ; there was nothing to prevent cattle, horses, sheep, and hogs from getting on the track ; it was necessary to fence it ; there was no town, city, or village where she was killed ; Sheldon was the nearest ; there was a settlement close all around on both sides of the track ; he saw the cow the next day after she was injured ; she lay twenty or thirty feet inside of the field, by the side of the track, on the south side.

Michaël Netterville testified, that he saw a lot of cattle feeding around on both sides of the track, outside of the field, before he went to dinner ; a train went west ; when he came back he saw a cow lying on the inside of the field, on the south side ; she appeared to have been knocked off from the outside into the field ; was section boss for the railroad company ; couldn't tell exactly when the cow was killed ; it was some time last fall ; might have been October ; recollects the circumstances ; did not know whose cow she was ; the road was not fenced east of the field ; a fence was necessary ; there was no road crossing there.

George Enslen testified : I was last summer and fall in the employ of the Toledo, Peoria, & Warsaw Railway Company ; some time in October last was on a train going west, on the company's railroad ; I was riding with the engineer, on the engine ; it was on engine twenty-two ; about two miles west of Sheldon, we struck a cow, and knocked her inside of a field ; she

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was just coming up on the track to cross over when the engine struck her ; I just got sight of her as the engine struck her ; I remember the engineer laughed at the time, and said to me, "I knocked her clean inside of the field ;" we were running pretty fast at the time ; east of that field there is no fence for over two miles ; cattle can get on the road anywhere along there ; no city, town, or village there, and no road crossing ; I know plaintiff ; he is a farmer, and lives a little way east and north of the railroad ; the railroad has been in operation for eight or nine years.

The above was all the evidence offered in the case. The jury found a verdict for the plaintiff, and judgment was entered in favor of the plaintiff accordingly. From this judgment the defendant appealed ; and assigned for error, that the evidence did not connect the defendant with the injury.

Bryan & Cochran, for the appellant.

Blades & Kay, for the appellee.

THORNTON, J.—The only error assigned in this case is, that the evidence does not connect appellants with the injury.

The railway company was sued for killing the cow of appellee.

From the evidence in the record, there can not be even a reasonable doubt that the cow was killed by the train of appellants. Such is the fair, if not necessary, inference.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Indianapolis, &c. R. R. Co. v. Warner.

THE INDIANAPOLIS, CINCINNATI, & LA-
FAYETTE RAILROAD COMPANY v.
WARNER.

35 *Indiana*, 515.

Supreme Court of Indiana; May Term, 1871.

Fences. Highways. Under a statute which requires railway companies to erect and maintain fences and cattle-guards along their tracks, and makes them liable for injuries to cattle from their engines, cars, &c., at points not sufficiently fenced, without other evidence of negligence causing the injury, where a railway company has not the exclusive right of way, as where its road runs along instead of across an alley, upon which others have a right to pass as well as the railway company, the latter, under such circumstances, can not legally construct fences or cattle-guards along its track, and is liable for injuries to cattle upon its track at such a point only when it is guilty of negligence.

Pleading. In an action against two railroad corporations to recover damages for the killing of a colt owned by the plaintiff, the complaint alleged that "the defendants, by their locomotives and cars then by them run upon their road, at said county and state, run over and upon one colt belonging to the plaintiff," &c. *Held*, that regarding the cause of action as a tort, or in the nature of a tort, it was sufficient for the complaint to charge that the act complained of was done by the defendants, without showing what relation they sustained to each other, and a recovery might be had against whoever should be shown by the evidence to be liable.

Appeal to the supreme court of Indiana from the circuit court for Morgan county.

This was an action by Warner to recover damages from the Indianapolis, Cincinnati, & Lafayette Railroad Company, and the Indianapolis & Vincennes

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Railroad Company, for the killing by the defendants of the plaintiff's colt. The history of the case, and the facts upon which arose the questions discussed, are fully stated in the opinion.

S. P. Oyler, and *D. W. Howe*, for the appellant.

C. F. McNutt, and *G. W. Grubbs*, for the appellee.

DOWNNEY, Ch. J.—This was a suit commenced before a justice of the peace by the appellee against the appellant and the Indianapolis & Vincennes Railroad Company, to recover the value of a colt alleged to have been killed by their locomotive and cars, then and there run upon their railroad, at said county and state, where the road was not fenced. There was judgment for the plaintiff before the justice of the peace, to be levied and made without relief from valuation laws. The defendants appealed to the circuit court, where they demurred to the complaint, which was then amended by the plaintiff. The demurrer was then refiled by the defendants to the complaint, assigning for cause that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and there was then a trial by the court, and finding for the Indianapolis & Vincennes Railroad Company, and against the Indianapolis, Cincinnati, & Lafayette Railroad Company. The latter company made a motion for a new trial, assigning as reasons the "permitting the plaintiff, after he had submitted the cause, to open the same and introduce new evidence," and also that the finding of the court was not sustained by the evidence, and was contrary to law. This motion was overruled, and judgment rendered on the finding against the Indianapolis, Cincinnati, & Lafayette Railroad Company, and in favor of the Indianapolis & Vincennes Railroad Company.

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The objection to the complaint, urged in the brief of counsel for the appellant, is that it does not show "any consolidation of the two companies, that one is the lessee of the other, or anything to inform them, or either of them, of a joint or several liability to the plaintiff, except the allegation 'their locomotive,' 'their railroad.'"

The complaint, as amended, states that "the plaintiff complains of the defendants, and says that on the — day of August, 1868, the said defendants, by their locomotive and cars, then by them run upon their road, at said county and state, run over and upon one colt belonging to the said plaintiff, and of the value of fifty dollars, and by so running over the same killed it. That at the time the same was so run over, the said road was not securely or in any way fenced in, at the point where said colt entered upon said road, and that the same was killed without the fault of plaintiff; to the damage of the plaintiff in the sum of fifty dollars, for which he prays judgment.

Regarding the cause of action as a tort, or in the nature of a tort, we think that it was sufficient to charge that the act was done by the defendants, without showing what relation they sustained to each other. The plaintiff may, in tort, sue all or any of the *tort-feasors*, and may recover against such as may be shown by the evidence to be liable. *Palmer v. Crosby*, 1 *Blackf. (Ind.)* 139. And it is provided by statute, "that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company, shall be liable, jointly or severally, with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act." 3 *Ind. Stat.* 413.

The complaint, in this case, charges that the act was done by both corporations. How they were related

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to each other is matter which it may be important to show on the trial, in order to make out the case. If it should turn out in evidence, for illustration, that the Indianapolis, Cincinnati, & Lafayette Railroad Company had leased, and was using the road of the Indianapolis & Vincennes company, at the time and place when and where the animal was killed, this would render both companies liable, under the section of the statute quoted.

The next question is as to the correctness of the ruling of the court in allowing the plaintiff to introduce new and additional evidence after the argument had commenced. We know it is somewhat annoying to the counsel, when they have, in argument, as was probably the case here, pointed out to the court wherein the evidence is insufficient, to have the court permit their adversary to avoid the consequences of such omission by allowing additional evidence; and perhaps it should not be allowed, except in case of surprise or excusable omission. But it is so far a matter in the discretion of the subordinate court, that this court has not, in any case, interfered. *Coats v. Gregory*, 10 *Ind.* 345; *Watt v. Alvord*, 25 *Id.* 533.

The next question is as to the sufficiency of the evidence to support the verdict.

It appears from the evidence that at the southern boundary of the town of Martinsville, and constituting such boundary, there was an alley running east and west; that Main street and Jefferson street, running parallel, north and south, with only one tier of blocks between them, terminated, at their southern end, at this alley; that when the railroad in question was being constructed, Mitchell furnished a part of the land necessary by setting back his fence from the south side of the alley, making altogether a space of about thirty feet, including the alley; that the railroad was located and made near the center of this

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space, in part on the alley and in part on the land given by Mitchell; that there was a fence along each side of this space, between Main street and Jefferson street, Mitchell owning the land on the south and Taylor on the north, and each maintaining the fence on his own side. Jefferson street terminated at the alley, but Main street continued on south of the alley and the railroad. The animal in question, and some others, were standing between the railroad and Mitchell's fence, near Main street, when the train approached from the west. Some of them ran down the continuation of Main street, south, while the others, including the colt which was killed, ran east; and the colt was soon afterwards found dead, at or near the southern termination of Jefferson street. There were no cattle-guards at the crossing of Main street, nor anything else to prevent animals from going upon the railroad from Main street to the point where the colt was killed. There is no evidence as to whether there were or were not cattle-guards at Jefferson street.

The material question is whether the railroad company was bound to have any other fence along its railroad, between Main street and Jefferson street, than was there, and whether they were required to have cattle-guards at Main street. In other words, were they bound to fence in their road at that point, or be liable for animals killed, without proof of negligence?

Counsel for the appellee insist, that in towns and cities, railroad companies are bound to fence their roads with the same care as without their limits, that the exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the corporate limits of towns and cities. This position may be correct as to those railroads which own, exclusively, the right of way in a town or city, in which they run, or through

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which they pass. In such a case it would, it seems to us, be possible for the company to fence in their road by making the required fences along the sides thereof, and the necessary cattle-guards to prevent cattle from going from the streets or alleys across which the road passes, upon the track of the railroad. But this case is not one of this character. There are cases where the railroad company has not the exclusive right of way, as where the road runs along, instead of running across the street or alley, and where others, as well as such company, have the right to pass on and along such street or alley. In such cases it seems to us that the company is not required to and can not legally construct fences or make cattle-guards on or along its track. In the case under consideration, the railroad ran partly on the alley and partly on the land given by Mitchell to the company. We must presume that the alley was one on which the public had a right to travel, and which they had a right to use as well as the railroad company. The company could not erect a fence along the north side of the railroad without placing the same in the alley, and thus unlawfully obstructing the same. Nor could the company, for the same reason, construct cattle-guards across the railroad track, at the east edge of Main street, and run a fence from such cattle-guards to the fence of Taylor, on the line of the east edge of Main street, without unlawfully obstructing such alley. But it may be said that the animal in question having been on the south side of the railroad, and on the land given to the company by Mitchell, outside of the town limits, the company might have fenced there, and that it might have placed cattle-guards and a fence south of the railroad to Mitchell's fence, on the line of the east edge of Main street. But these would not inclose the road. They, united to Mitchell's fence, would only make a fence on the south side of the road, and pro-

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duce danger instead of safety, while the north side would be entirely open.

We are not inclined to hold that the company was bound to make a fence on the south side of the road nearer to it than the fence of Mitchell. This fence was only twelve or fourteen feet from the railroad track, which would probably leave little enough space for convenience in operating and repairing the road. See *Indianapolis, &c. R. R. Co. v. Irish*, 26 *Ind.* 268. Under the circumstances disclosed in this case, we do not see how the road, at the point in question, could legally have been "fenced in, and such fence properly maintained by such company," &c., as contemplated by the statute.

There is some discrepancy in the evidence as to whether Mitchell's fence was standing, at the point designated, at the time the animal was killed or not. We incline to the opinion that it was; but it would not change our view if the fence was not then standing at that point.

The appellant contends that because the judgment before the justice of the peace was rendered without relief from valuation laws, and was, in this respect, unauthorized, the plaintiff was liable for costs from the time of filing the appeal bond, and a motion for judgment to this effect was made and overruled, to which the defendant excepted, and this is assigned for error. Counsel for the appellant have failed to satisfy us that this was erroneous. No authority for such an order has been furnished to us, and we do not recall any such authority.

The judgment is reversed, with costs, and the cause remanded.

Judgment reversed.

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THE INDIANAPOLIS, CINCINNATI, & LAFAYETTE RAILROAD COMPANY v. ROBINSON.

85 *Indiana*, 380.

Supreme Court of Indiana ; May Term, 1871.

Fences. Injury to cattle. Pleading. Under the statute of Indiana making railway companies liable for injuries to stock upon railroads not securely fenced, in an action to recover damages for such injuries the complaint must allege that the road was not securely fenced. An averment that the road "was not fenced according to law" is not sufficient.

Independent of such a statute, a complaint against a railway company in an action for damages for negligently killing stock, which does not allege that the injury did not result from the negligence of the plaintiff, is not good at common law.

Appeal to the supreme court of Indiana from the circuit court for Marion county.

This was an action by Robinson to recover damages from the Indianapolis, Cincinnati, & Lafayette Railroad Company, for the killing by the defendant's train of two hogs owned by the plaintiff. The history of the case, and the facts upon which arose the questions discussed are stated in the opinion.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

I. Klingensmith, for the appellee.

DOWNEY, Ch. J.—This action was brought by the

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appellee against the appellant before a justice of the peace, where there was judgment for the plaintiff, and an appeal to the circuit court. In the latter court there was a trial by the court, finding for the plaintiff, motion by the defendant for a new trial overruled, and judgment on the finding.

Two questions are presented here: first, that the complaint is insufficient; and second, that the circuit court should have granted a new trial on account of the insufficiency of the evidence.

The complaint alleges, that on or about August 14, 1868, at the county of Marion, and state of Indiana, the defendant did kill two hogs of the plaintiff, of the value of thirty dollars, through the fault, misconduct, and negligence of the employes, servants, and agents of the defendant, by striking and running over the said hogs with a locomotive and train of cars running on the defendant's road, which road was not fenced according to law, &c.

It is urged against the complaint, that it is not a good one for negligence, because it does not allege that the plaintiff was without fault; and that it is not good under the statute requiring railroads to be fenced, because it does not allege that the road was not securely fenced, but only alleges that the road was "not fenced according to law," which it is contended is a mere conclusion of law.

To render the company liable, under the statute, it must be alleged and proved that the road was not securely fenced, &c. *Indianapolis, &c. R. R. Co. v. Means*, 14 *Ind.* 30; *Indianapolis, &c. R. R. Co. v. Williams*, 15 *Id.* 486; *Indianapolis, &c. R. R. Co. v. Wharton*, 13 *Id.* 509.

In *Toledo, &c., R. R. Co. v. Fowler*, 22 *Ind.* 316, this court held, that, to allege that the road was not "fenced in by the defendant, in manner and form as in the statute provided," was sufficient. And in

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Indianapolis, &c. R. R. Co. v. Adkins, 23 *Ind.* 340, it was held by this court, that the allegation that the road "was not securely fenced as required by law," was sufficient. But in Indianapolis, &c. R. R. Co. v. Bishop, 29 *Ind.* 202, the court seems to disapprove of the preceding cases, and that in 22 *Ind.* is expressly overruled. The learned judge who delivered the opinion says the case in 23 *Ind.* was not in point, because the allegation was, that the road was "not securely fenced." But the allegation was, as we have seen, that the road was "not securely fenced as required by law." In the case in 29 *Ind.*, the court held that the allegation, that the road was not fenced "as required by law," was only a conclusion of law, and not sufficient. It is, perhaps, more important to adhere to some one rule, than to try to determine which is exactly the best or most conformable to the authorities. Following the case in 29 *Ind.*, *supra*, which is the last expressed opinion of this court, we must hold the complaint in the case at bar insufficient as a complaint under the statute.

Is it good as a complaint for an injury resulting from the negligence of the defendant, at common law, irrespective of the statute? It fails to allege, as will be seen, that the injury did not result from the negligence of the plaintiff. In our opinion, this defect renders the complaint bad as a complaint at common law. In Wright v. Indianapolis, &c. R. R. Co., 18 *Ind.* 168; Indianapolis, &c. R. R. Co. v. McClure, 26 *Id.* 370; Toledo, &c. R. R. Co. v. Bevin, 26 *Id.* 443, it is so held by this court in cases for killing cattle. Being governed, then, by these cases, we must hold that the complaint is fatally defective as a complaint at common law. It is contended by counsel for the appellee, that as the case originated before a justice of the peace, the complaint should not be tested by the same rules that are applied to complaints in the

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higher courts. But we can not so decide. It requires no more skill in pleading to say that the injury resulted without any negligence on the part of the plaintiff, than it does to allege that it resulted from the negligence and carelessness of the defendant. Both allegations are necessary to make the complaint substantially good.

As the case may again have to be tried upon the facts, we express no opinion upon them.

The judgment is reversed, with costs, and the cause remanded, with directions to the court to sustain the demurrer to the complaint, and if desired, grant leave to amend.

Judgment reversed.

WEBB v. THE ROME, WATERTOWN, & OGDENSBURG RAILROAD COMPANY.

49 *New York*, 420.

Court of Appeals of New York; May Term, 1872.

Negligence. Fires. During a long continued and extreme drouth, and while a strong wind was blowing from the line of the defendant's railroad in the direction of the plaintiff's woodland adjoining, a locomotive of the defendant's dropped live coals upon the track opposite plaintiff's woodland. The coals set fire to a tie on the track, and thence the fire was communicated to an old tie and to an accumulation of grass, weeds, and rubbish on defendant's land beside the track, whence the fire spread to plaintiff's fence, and upon his land, burning trees and soil. *Held*, that the damage suf-

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ferred by the plaintiff was not so remote as to relieve the defendant from liability on the ground of negligence in setting the fire.

The act of negligence of the defendant consisted not merely in suffering the coals to drop from the engine. The continued and extreme dryness of the atmosphere and of the earth and its herbage, and of all matter that was upon the earth at that place; the blowing of the wind with the strength it did, and in the direction it did; the accumulation of weeds, grass, and rubbish by the side of the defendant's track, between it and the plaintiff's land, were all constituents of the act of the defendant, and went together to make it negligent. The result was an ordinary, usual, and necessary result, and reasonably to be expected. And the question of negligence, under the circumstances, was properly submitted to the jury.

Evidence. On the trial of such an action, testimony as to the presence of coals on the track at the time of the fire, or at the place of the fire at other times not remote therefrom, or at once after the passage of the particular engine from time to time, is pertinent and proper.

Negligence. Fires. The English statutes of Anne (6 *Ann.*, ch. 31, § 67) and of George III. (14 *Geo. III.* ch. 78, § 76)—which provide for exemption from liability for fires accidentally begun,—even if they are part of the common law of New York, do not afford any defense to one who negligently sets or manages a fire by the spread of which damage is caused to his immediate neighbor.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action by Alfred Webb to recover damages from the Rome, Watertown, & Ogdensburg Railroad Company for injuries by fire to woodland owned by the plaintiff, alleged to have been caused by the negligence of the defendant.

It appeared, on the trial, that during an extreme drouth, and at a time when the wind was blowing strongly from the defendant's road towards the wood lot of the plaintiff, one of the defendant's locomotives in passing along its road, opposite this wood lot, dropped live coals upon the track. There was evidence tending to show that this was due to the defective con-

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struction of the engine, which permitted the live coals to escape. These coals set fire to a tie on the track; thence the fire was communicated to an old tie at the side of the track and to weeds and grass which had been cut down beside the track, and to other rubbish on defendant's land, all of which in consequence of the drouth were very dry; and by them the fire was conducted to the fence, and thence upon plaintiff's land, burning the trees and soil.

The court allowed the plaintiff to give evidence showing that defendant's engine for a month or two before the fire had dropped quantities of live coal in the locality of the fire; that there were live coals upon the track at other places at the time of the fire; and that coal at other times had dropped from the engine in question; to all which the defendant objected.

Defendant's counsel moved for a nonsuit upon the ground that no negligence on the part of defendant had been shown, and that the damages were too remote. The motion was denied. The jury found a verdict for the plaintiff, and judgment for him was entered thereon. From this judgment the defendant appealed to the general term, which affirmed the judgment; and from the judgment of the general term the defendant appealed to the court of appeals.

Edmund B. Wynne, for the appellant.

Plaintiff's loss was not the direct and immediate result of defendant's act, and the latter is not liable. *Bacon Max.*, Reg. 1, vol. 3, p. 223; *Ryan v. New York Central R. R. Co.*, 35 *N. Y.* 210; *Pennsylvania R. R. Co. v. Kerr*, 62 *Pa. St.* 353.

Points which pass *sub silentio* are not to be regarded as adjudged. *People v. Corning*, 2 *Com.* 15; *Freeland v. McCulloch*, 1 *Duer (N. Y.)* 414; *Johnston v. Kniffin*, 2 *J. R. (N. Y.)* 36.

The fire was accidental, within 6 *Anne*, ch. 31, §

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67, as amended 14 *Geo. III.*, ch. 781, § 76. That is a part of the common law and excuses defendant from liability. *Lansing v. Stone*, 37 *Barb.* 17; 1 *Black. Com.* 431.

James F. Starbuck, for the respondent.

Where running in a place of peculiar exposure to fire, extra diligence is required of a railroad. *Fero v. Buffalo, &c. R. R. Co.*, 22 *N. Y.* 209; *Phillips v. R. W. & O. R. R. Co.*, *Gen. Term*, fourth department. The evidence to the dropping of coals was proper. *Sheldon v. Hudson River R. R. Co.*, 14 *N. Y.* 218; *Hinds v. Barton*, 25 *Id.* 544; *Field v. New York Central R. R. Co.*, 32 *Id.* 339. The evidence of negligence was sufficient to go to the jury, and their finding is conclusive. *Rood v. New York, &c. R. R. Co.*, 18 *Barb. (N. Y.)* 80; *Fero v. Buffalo, &c. R. R. Co.*, 22 *N. Y.* 209; *Sheldon v. Hudson River R. R. Co.*, 14 *Id.* 218; *Hinds v. Barton*, 26 *Id.* 644; *Field v. New York Central R. R. Co.*, 32 *Id.* 339.

Where one carelessly kindles a fire upon his own premises, which necessarily communicates to and burns another's property, he is liable. 18 *Barb. (N. Y.)* 80; 3 *Kent. Com.* 436, note *a*; 4 *Id.* 18, 83; *Fielter v. Phippard*, 63 *Eng. C. L.* 346; 11 *Ad. & Ell. (N. S.)* 347; *Clarke v. Foote*, 8 *J. R.* 421; 3 *Kent Com.* 436, note *a*; 4 *Id.* 81, 83; *Barnard v. Poor*, 21 *Pick. (Mass.)* 378; *Hart v. W. R. Co.*, 13 *Metc. (Mass.)* 99; *Piggott v. E. C. R. Co.*, 54 *Eng. C. L.* 228; *Cook v. C. T. Co.*, 1 *Denio (N. Y.)* 91; *Vaughn v. Menlove*, 32 *Eng. C. L.* 208; 3 *Bing. (N. C.)* 468; *Simons v. Monier*, 29 *Barb. (N. Y.)* 421; *Field v. New York Central R. R. Co.*, 32 *N. Y.* 339.

The statute 6 Anne and 14 George III. were never in force in the colony of New York, and did not become part of our common law. 1 *Blacks. Com.* 101; 1 *Jones & Ves. Stat.*, ch. 35, 281. If retained, they do

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not extend to fires occasioned by negligence. 63 *Eng. C. L.* 346, 347; *Vaughn v. Taff Vale Railway*, 3 *Hurls. & N.* 742.

FOLGER, J.—I think that the question whether the defendant was negligent in kindling the fire, was properly left to the jury to decide. It is true that employes of the defendant who were called as witnesses, did testify with more or less positiveness and particularity, that the engines of the defendant, and the one engine especially complained of, were fitted with all the best appliances in known practical use for the prevention of the escape of fire; and that the engines and this engine and these appliances were in good order at the time of the fire. On cross-examination, however, most if not all of these witnesses made statements tending to show that there was something in the construction or mode of attaching some of these appliances, which left a chance for the escape of coals of a size which was dangerous. And most if not all of them did concede, that if coals were found of the size, and in the quantity, and with the frequency, and at the places spoken of by other witnesses, it must have been that the engines and this engine of the defendants were not in good order in the apparatus and appliances provided to prevent the escape of fire. These other witnesses were as positive and as particular as were the witnesses for the defendant. It was for the jury to decide where they would put their belief; and to find that the engines were not well provided with the requisite preventive apparatus, or that being so provided it had been suffered to get into bad order, or that they were well provided with sufficient and proper apparatus, well cared for and in complete order.

The verdict shows that the jury found that the defendant was negligent, either in the lack of provision

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of proper and sufficient apparatus, or in not well caring for it after it was attached to the engine.

And upon the issue which arose on this question, the testimony as to the presence of coals on the track, at the time of the fire, or at the place of the fire at other time not long therefrom, or at once after the passage of this engine from time to time, was pertinent and proper.

The verdict of the jury rendered upon testimony proper, competent, and sufficient, has established that this state of facts existed. At a time of continued and extreme drouth, while a strong wind was blowing from the land of the defendant toward the wood-land of the plaintiff, a fire was negligently kindled by the defendant on its land, which was self-fed with dry and combustible matter, accumulated there in more than ordinary quantity by the direct act and sufferance of the defendant. This fire, fanned and driven by this wind, spread through this matter to the fences of the defendant, and burned them, and on to the wood-land of the plaintiff lying immediately contiguous to land of the defendant, and there burning and injuring his growing forest trees, did him damage.

The defendant contends that on this state of facts, as a matter of law, it is not liable to the plaintiff. This contention is put upon the single ground that the damage suffered by the plaintiff is too remote.

In my judgment, this position of defendant can not be maintained.

It certainly is not a novel proposition, that he who by his negligence or misadventure creates or suffers a fire upon his own premises, which burning his property spreads thence on to the immediately adjacent premises of another, and there destroys the property of the latter, is liable to him in an action for the damage which he has suffered.

See *Beaulieu v. Finglam*, cited by *DENIO, J.*, in

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Althorf v. Wolfe, 22 *N. Y.* 355-366, from the *Year Books*; Snagg's Case, reported as anonymous, *Cro. Eliz.* 10, pl. 5; Tuberville v. Stamp, 1 *Salk.* 13; Pantam v. Isham, *Id.* 19; Clark v. Foot, 8 *J. R.* 421. Nor is it one which though once held, has in later days been questioned and discarded. Filliter v. Phippard, 11 *Add. & Ell. (N. S.)* *347; 63 *E. C. L. R.* 346; Barnard v. Poor, 21 *Pick. (Mass.)* 378; Field v. New York Central R. R. Co., 32 *N. Y.* 339; Smith v. London, &c. R. Co., *Law Rep. 5 Com. Pl.* 98.

"This rule, it was said, was founded on the general custom of the realm; in other words, it was a peculiarity of the common law" (Viscount Canterbury v. Att'y-Gen., 1 *Phill.* 306), and has its support in the maxim "every man must use his own so as not to hurt another" (1 *Salk.* 13, *supra*), and it was applied not only to the case of a fire arising in a house, but to that of one arising on the open land; and not only where the fire was intentionally set and carelessly managed, but where negligently kindled.

At first it was held that the defendant was liable though guiltless of negligence, and that he could defend himself only by showing that the fire was excited by some superior cause which he could not resist nor control. And so firmly fixed was this rule in the common law, that there must needs be a statute to soften its rigor. 6 *Anne*, ch. 31, § 67, and 14 *Geo. III.* ch. 78, § 76.

We have the common-law principle well established and thoroughly recognized and still existing to this extent; that he who negligently sets or negligently manages a fire in his own property, is liable to his immediate neighbor for the damage caused to him by the spread of the fire on to his neighbor's next adjacent property.

It is a principle too firmly fixed, and certainly in cases like the present, too reasonable and salutary, to be shaken for light considerations.

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It is said that in the cases cited above, the point now made by the defendant was not raised ; that it passed *sub silentio*. And citations are made to show that points which pass *sub silentio* are not to be regarded as having been adjudged. It is, however, equally as true, that where there has been a long series of uniform decisions, asserting the same principle, and reaching the same conclusion upon facts which are alike, where a point now lately made was as much involved, the fact that the point has not been in any of all these cases raised by counsel or stated by the court, is strong support that it is now made without ground. In each of two cases hereafter noticed, much relied upon by the defendant, LITTLETON's rule is cited with approval from 1 *Vern.* 385 ; " what never was, never ought to be." See, also, *Vose v. L. & Y. A. W. Co.*, 2 *H. & N.* 728, 734.

Again: It is urged that the statute of Anne, as amended by that of the third George above cited, is a part of the common law of this state ; and that thereby it is provided that " no action, suit, or process whatever shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall . . . accidentally begin, nor shall any recompense be made by such person for any damage thereby, any law, usage, or custom to the contrary notwithstanding."

It is not needed that it be determined whether the claim that these statutes are a part of the common law of this state is well founded. It is sufficient to say of them, that they apply only in a case in which the fire did " accidentally begin ;" and that it has been held, on grave consideration, that a fire arising from negligence is not one which does accidentally begin, and that the statutes referred to afford no defense to one who negligently sets or manages his fire. *Filliter v. Phippard*, *supra*. It is also urged that the decision in

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Ryan v. New York Central R. R. Co., 35 *N. Y.* 210, followed and approved in Pennsylvania R. R. Co. v. Kerr, 62 *Pa. St.* 353, has announced a rule which conflicts with the cases herein above cited. I do not understand it to be so, or that the decision in 35 *N. Y.* and 62 *Pa. St. supra*, put forth a new rule of law, or one which has not been acted upon and recognized *pari passu*, with the recognition and growth of the principles upon which most of the cases above cited are based. In Ryan's Case, the opinion of the court was that the action could not be sustained, for the reason that the damage incurred by the plaintiff was not the immediate but the remote result of the negligence of the defendant. It certainly was not a new rule that the damages resulting from an act may be too remote for the actor to be liable therefor. The court defined remote damages to be those which are not an ordinary and natural, not an expected, not a necessary and usual result of the negligent act; and still further, as those which depend upon a concurrence of accidental and varying circumstances, over which the negligent party has no control. This was not a modern definition. The facts in the Ryan case are familiar, but they can be repeated briefly. The defendant by its negligence in not keeping in sufficient good order its engine, or in not properly managing it, set fire to its own wood-shed and the contents thereof. The fire from this was communicated through an intervening vacant space of one hundred and thirty feet, to the building of the plaintiff standing on his premises, which were not in contiguity with those of the defendant, and it was destroyed. And the pith of the decision is, that this was a result which was not necessarily to be anticipated from the fact of the firing of the wood-shed and its contents; that it was not an ordinary, natural, and usual result from such a cause; but one dependent upon the degree of heat, the state of the atmos-

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phere, the condition and materials of the adjoining structures and the direction of the wind, which are said to be circumstances accidental and varying. The principle applied was the converse of that enforced in *Vandenburgh v. Truax*, 4 *Denio* (N. Y.) 464, which was that the consequence complained of was the natural and direct result of the act of the defendant. This principle is said in the *Ryan* case not to be inconsistent with that which controlled the disposition of the latter case, and to be unquestionably sound, but to be applied according to sound judgment in each case as it arises.

The case from the *Pennsylvania Reports* is the same in its material facts, the same in the principle on which it is put, and in the process of reasoning by which that principle is applied to the facts.

I am of the opinion, that in the disposition of the case before us, we are not to be controlled by the authority of the case in 35 *N. Y.* more than we are by that of the long line of cases which preceded it, and which have been herein cited and adverted to. It announces no new principle. It recognizes the principle which it adopts as one before that established, and applying it to the facts therein existing, holds that the damage sued for was not the necessary and natural result of the negligent act. A different state of facts brought into the focus of the same principle, would give a different conclusion. It is proper, however, to say, that it is not necessary in this case to differ from or to question the reasoning in that case, which fortifies the conclusion there reached, by a consideration of the relations of men to each other in populous villages and cities, and the disastrous consequences to follow from holding one liable for his own or his servant's negligence by which a fire is kindled in his house which spreads to the property of one or more neighbors.

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Let us look at the facts and circumstances in the case before us. It is argued that the negligent act of the defendant here was only the suffering of coals to drop from its engine. It can not be so circumscribed. The negligence consisted not merely in that. It was an act of negligence made up of all the facts and circumstances in which the coals were let fall. The insufficient or deranged condition of the preventive apparatus of the engine, the continued and extreme dryness of the atmosphere, and of the earth and its herbage, and of all matter that was upon the earth at that place; the blowing of the wind with the strength it did, and in the direction it did; the accumulation of weeds, grass, and rubbish by the side of the defendant's track, between it and the plaintiff's land; were all constituents of the act of the defendant, and went together to make it negligent. It would not be negligent to throw aside a lighted match upon the margin of a stream, or into grass that is lush. It would be negligent to fast hold it in one's hand unlighted, in a powder-mill. "Now the definition of negligence," says WILLES, J., "is the absence of care according to the circumstances." *Vaughan v. Taff Vale R. Co.*, 5 *Hurlst. & N.*, 679-687. And this meets the further position taken in the argument, that as the negligent act of the defendant was the dropping of the coals, it can not be said that this was the cause of the burning of the plaintiff's woods; for the coals, it is said, set fire only to the tie within the track of the defendant, and thus it was not the live coal from off the engine which fired the plaintiff's timber. The coal fired the tie; fire or heat from that touched the old tie lying beside and extending at a right angle from the track; fire from that ignited the dry herbage, the gathered weeds and grass, and the rubbish down the side of the bank; fire from that caught in the fence of the defendant; and that burning communicated with material

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on the plaintiff's land ; and so not by the first cause, but by the last cause, so many removes from the first, which was the negligent act, was his property consumed. Such is the reasoning used to show that this damage is too remote from the defendant's negligent act, for a liability therefor to be incurred thereby. Here, too, the act of negligence is limited to the dropping of the coal ; and so limited it is plausible to call the results which followed consequential steps, each farther removed from the prime act of negligence, and hence the last too remote therefrom to be a necessary and expected result.

But if in a time of extreme drouth and high wind, there be laid or suffered to gather a train of readily combustible matter up to the bounds of another's property ; it is not to be denied but that it is an act of negligence to drop fire at the hither end of that train ; nor but that it is an ordinary, a usual, a necessary result, reasonably to be expected, that the fire will run from particle to particle through it, and catch in whatever will burn which is adjacent at the thither end.

Such was substantially the state of matters in the case before us. And the learned judge, THOMPSON, Ch. J., who delivered the opinion in *Kerr's Case*, in 62 *Pa. St.*, foresaw the possibility of such a case ; "there might possibly be a case," he says, "in which the causes of disaster, although seemingly removed from the original cause, are still incapable of separation from it, and the rule suggested might be inapplicable. And in *Vaughan v. Taff R. Co.*, *supra*, COCKBURN, Ch. J., says, that if the jury had found that the fire was cast by the defendant upon the herbage, and other combustible matter upon the bank of the railway, which caught fire therefrom, and thence extended to the plaintiff's wood, the defendant would be liable. In *Smith v. London, &c. R. Co.*, *supra*,

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counsel for the plaintiff in argument claimed that the negligence of the defendant in leaving the trimmings of the hedges on the sides of the line for fourteen days in unusually dry weather, was the immediate cause of the damage to the plaintiff. The counsel for the defendant, on the other hand, insisted that there was a combination of circumstances for which the defendant was not responsible, and the result was what no reasonable person could have anticipated. BOVILL, Ch. J., in giving his opinion as one of the majority of the court, thinks "it impossible to say that there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction . . . was the natural consequence of their (the defendants') negligence." And see *Scott v. Hunter*, 46 *Pa. St.* 192; *McGraw v. Stone*, 53 *Id.* 441.

The question in the case in hand arises upon a motion made by the defendant to nonsuit the plaintiff, which was denied and exception taken, and upon an exception to a refusal by the court to charge the jury that if the fire originated by the negligence of the defendant in permitting coals to drop from its engines and kindling a fire upon its own premises, from which it spread and burned the timber of the plaintiff in an adjacent lot, the defendant was not responsible.

I am of the opinion that there was evidence to be submitted to the jury, whether the defendant was not negligent in the use of its property, and whether the injury complained of was not a probable consequence of the negligent acts and omissions of the defendant.

The defendant asks in effect that this court hold that it is not liable for the damage to the plaintiff, unless it appears that the coals which escaped from the engine were cast from the engine directly upon the property of the plaintiff which was injured. If the air had been the medium through which was conveyed

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the same fire which left the engine, it seems to be conceded that the damage was the immediate and natural result of the negligence. I am unable to perceive a reasonable distinction between the air as a medium of conveying the fire, and the denser matter which had accumulated upon the ground there. Nor am I able to confine the act of negligence to the dropping of the coal from the engine, and thus separating it from all the other concurring acts and omissions of the defendant, make that the solitary prime cause of a series of causes. If this were so, it might as well be said that of a hundred growing trees burned by a fire kindled among them by a cinder thrown from a locomotive, the sufferer could recover for only the one upon which the cinder fell, and that as the others took fire from the flame of that, it was not the negligent act which caused their destruction.

I am, therefore, of the opinion that there was no error committed at the trial, and that the judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed.

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THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY v. McCAHILL.

56 Illinois, 28.

Supreme Court of Illinois ; September Term, 1870.

Negligence. Fires. Evidence. In an action against a railway company to recover for damage to property from fire communicated from the defendant's locomotive, brought under a statute which declares that the fact that the fire was communicated from the engine shall be *prima facie* evidence of negligence on the part of the company using the engine, upon proof of that fact, the burden of proving that the locomotive was in good order is upon the defendant. And evidence that, at the time of the injury, the locomotive threw out an unusual quantity of fire, will sustain a verdict for the plaintiff, notwithstanding direct testimony that the locomotive was in good repair, and provided with proper appliances to arrest sparks.

In such a case, it is not error to allow a witness, testifying to the loss of articles destroyed by the fire, to refresh his memory from a memorandum of such articles. And evidence of the destruction of articles not included in the declaration is admissible, as part of the *res gestæ*; though no damages could be recovered for the loss of such articles.

Appeal to the supreme court of Illinois from the circuit court of Kane county.

This was an action by James McCahill to recover from the Chicago & Northwestern Railway Company damages for the destruction of his property by fire communicated from the defendant's locomotive. The facts in the case are stated in the opinion. Judgment was rendered for the plaintiff; and from the judgment the defendant appealed.

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A. M. Herrington, for the appellant.

Blanchard & Silver, and *Joslyn & Slavin*, for the appellee.

SCOTT, J.—This was an action on the case, brought in the circuit court of Kane county by the appellee, to recover for the loss of a barn and contents, alleged to have been destroyed by fire communicated from the engine of appellants running on their road through the village of Woodstock.

It is averred in the declaration that at the time the fire occurred the engine of the appellants was not provided with the best and most usual mechanical contrivances to prevent the improvident escape of fire sparks, and, by reason of the neglect in that regard, the appellants were guilty of culpable negligence in running the engine on their road in its then condition.

The evidence preserved in the record is of such a character that it leaves no serious doubt on the mind that the fire which destroyed the property of the appellee on April 15, 1869, was occasioned by fire sparks emitted from the locomotive engine passing at the time, and fully justified the finding of the jury on that issue. A number of witnesses, on whose testimony the jury must have relied, state that, at the time the engine passed the premises of the appellee, it was emitting an unusual volume of fire sparks and that some of them were carried a great distance from the track. The distinct marks left by the fire emitted from the engine were to be seen in many places near the premises of the appellee. The property destroyed stood some sixty feet from the track and not far distant from the depot. While the witnesses do not agree as to the exact hour that the engine passed the premises on the day of the fire, they do, substantially, all agree that

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the fire occurred soon after the train passed. After a careful consideration of all the evidence, we can reach no other conclusion than that arrived at by the jury, that the fire that caused the destruction of the property in question was occasioned from fire sparks emitted from the engine of appellants, while in use on their road. No other explanation of the origin of the fire is or can be given consistently with the evidence. The fire that occasioned the damage complained of occurred after the passage of the act of 1869. *Gross Comp.* p. 554. And by the provisions of that act, the fact that the fire was occasioned from the engine, is made full *prima facie* evidence of negligence on the part of the company, and of its agents and servants in charge at the time. This primary fact in the case being once established by the evidence, the burden of proving that the engine was in good order at the time, and provided with all the best and most usual mechanical contrivances to prevent the escape of fire sparks, rested on the company. Under the provisions of that act it is the duty of the company to rebut, by affirmative evidence, the *prima facie* case made by proof of the single fact that the fire which caused the injury complained of was occasioned by the engine. The use of steam as a propelling power on the lines of railroad is known to be dangerous to property in the vicinity, even by the most careful use. Notwithstanding the known danger, the legislature has seen fit to invest railway companies with the right to use that kind of power in the exercise of their franchises, yet upon this condition, that such corporations will use all possible precautions by the use of the most approved mechanical contrivances for that purpose, to prevent danger to the property of the citizen along the lines of their roads through the escape of fire from their engines. The reckless use of this power would introduce into our towns and cities and farming communities along the

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lines of these roads a most dangerous element of destruction, and that fact itself imposes upon the company a high degree of care and skill in the use of the engine and in the application of the best and most effective means to prevent the escape of fire. The law has wisely imposed this duty on all railroad companies, otherwise there would be no security whatever for property on the lines of these great thoroughfares that now traverse the country in every direction. The degree of care required is always in proportion to the danger, and the greater the danger the higher will be the degree of care required. The rule is a reasonable one. The companies have these engines under their control, and the opportunity of frequent and constant examination. The citizen, whose property is exposed to danger, has no such opportunity, and must rely on the care and vigilance of the companies. In the absence of such degree of care and diligence to prevent injury to property, the courts have always held railway companies to a strict accountability for any loss that may occur. *Illinois Central R. R. Co. v. Mills*, 47 Ill. 407.

The material questions that arise upon this record and present themselves for consideration are, whether the evidence shows that the company used that degree of care and diligence that the law requires, in the application of mechanical contrivances to prevent the emission of fire sparks from their engine, and whether the engine was in good repair, and whether it was skillfully handled by a prudent and competent engineer.

We learn from the evidence that the engine "Jupiter," that was used by the company on the day the fire occurred, had lately been in the shop for repair, and that a new wire netting was then put in, of the ordinary size, strength, and quality. A number of the witnesses testified that the engine was in good repair. It does not appear that any repairs were

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made on it when it was in the shop, except to put in the new wire netting. If any particular examination was made of the condition of the engine, the witnesses do not state the minutæ of that examination. We understand that the main contrivance relied on to arrest fire sparks is an inverted iron cone, called, perhaps, a spark deflector, so adjusted that it receives and checks the fire before it reaches the wire netting in the smoke-stack. When the exhaust is very great, the fire is driven out with tremendous force, and one purpose of this cone is to check the great force of the fire sparks, and to prevent them from striking the wire netting with such force as to destroy it. Without this cone, or some other such contrivance, the wire netting would be practically of very little use. The condition of the spark arrester, in this instance, is not stated by any of the witnesses. If it was out of order, perhaps no wire netting, of the size used in making the repairs, that was ever wrought could have withstood the force of the fire thrown from a coal burning engine for a day or for any considerable length of time. In opposition to all the evidence offered by the company, there is the unimpeached testimony of witnesses that the engine, as it passed through the village on the day the fire occurred, threw out unusual quantities of fire, and that it did actually occasion the fire that consumed the property of appellee. Intelligent witnesses, and men of large experience, sworn on behalf of the company, concede the fact, that if it be true that the engine did emit such an unusual volume of fire as stated by the witnesses, it must necessarily have been out of repair at the time. Whether this engine was ever equipped with the best mechanical contrivances to prevent the emission of fire sparks does not very clearly appear; but, if it be admitted that it was originally so constructed, the actual results of what the engine did, in throwing out and emitting

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fire sparks as it passed along through the village on the day the fire occurred, are sufficient to overcome any direct evidence appearing in this record that it was in good order ; or, if in good order, it must have been most unskillfully managed by the engineer.

We are of opinion that the verdict is not against the weight of the evidence, and the jury were fully authorized to find as they did.

It is insisted that the court erred in permitting the appellee to read from a memorandum used by him in giving his evidence.

It appears from the record that the appellee had made a memorandum of the things destroyed by the fire, and had the same in his hand at the time he was testifying, and used it for the purpose of refreshing his recollection. The record states that the court allowed the witness to refresh his recollection from the paper. We see no error in the ruling of the court on that question.

It is further objected that the witness also testified to some small things that were destroyed by the fire that were not included in the declaration. It was a part of the *res gestæ*, and there was no error in the court permitting the witness to testify to all that transpired. If the jury only allowed for the articles described in the declaration, at the prices fixed by the witnesses, the evidence would fully sustain the verdict, and we may therefore presume that the jury did not allow for any articles not included in the declaration. Doubtless the court would have instructed the jury not to allow for any articles not embraced in the declaration, if it had been asked so to do.

In support of the motion for a new trial, the counsel for appellants filed an affidavit, in which he alleges that the interests of his clients were greatly prejudiced by a rule adopted by the circuit court, in which the cause was tried. The rule to which reference is made,

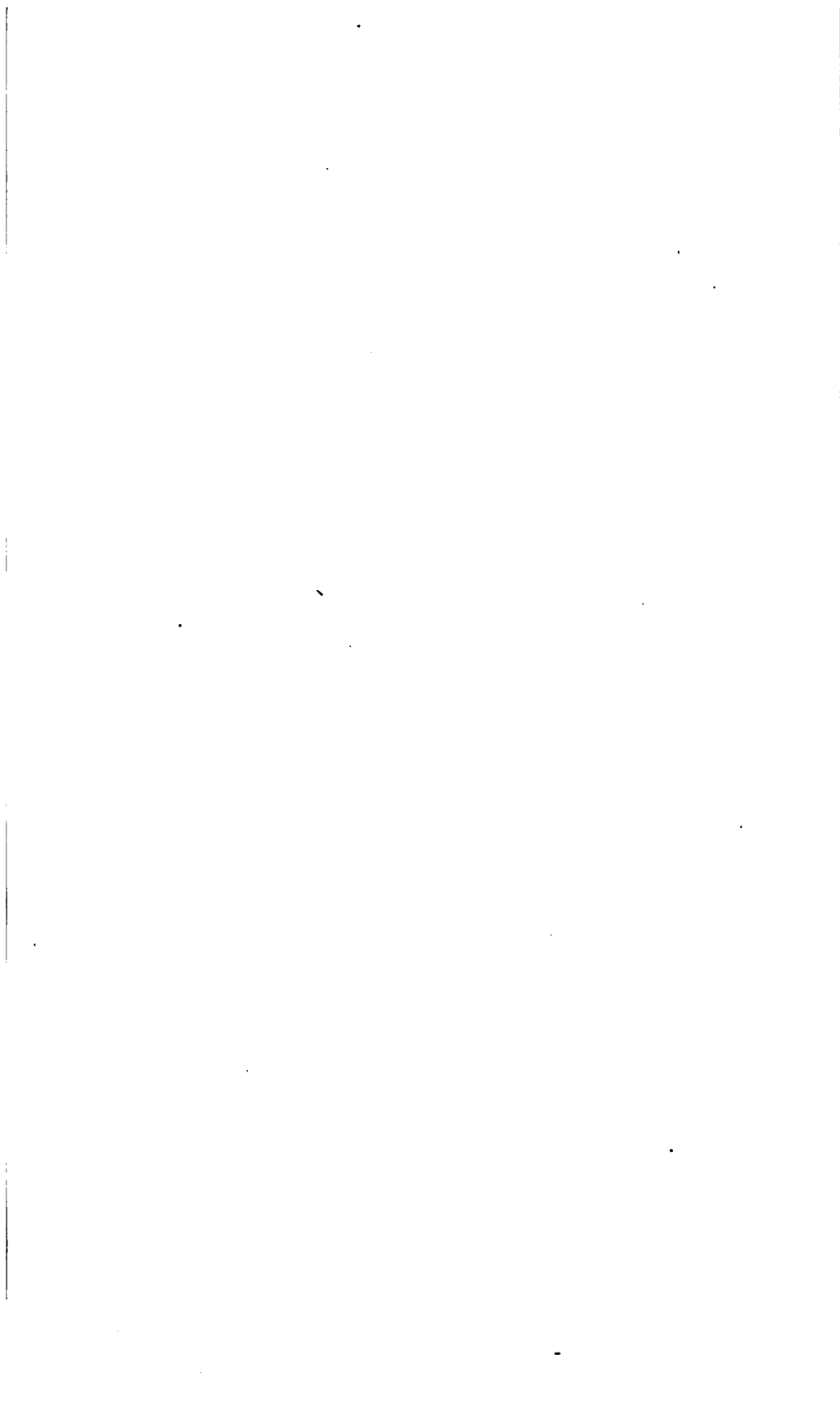
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required that all instructions should be presented to the court before the commencement of the final argument to the jury, or they would not be examined by the court. We apprehend that the counsel has not pursued the proper course to test the validity of that rule of court. If the counsel desired any further instructions to be given to the jury, he should have presented the same to the court, in writing, and if the court had then refused to examine and mark the same "given" or "refused," as the statute requires, he should have embodied the same in a bill of exceptions, and the ruling of the court would have been subject to review by this court. This was not done, and we can not consider the question in the manner it is now presented.

We are unable to discover any substantial error in the court in giving and refusing instructions at the trial. Those given in behalf of the appellee embody, in substance, the principles announced in this opinion, and were sufficiently accurate in the statement of the law.

The judgment of the circuit court will be affirmed.

Judgment affirmed.



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1. Trustees in a mortgage of the property of a railroad, who appear and answer in a suit to enforce the security of a prior mortgage, thereby waive any defect in the service of process upon them. Their power to waive such defect is not affected by the fact that they are representative defendants. *Cheever v. Rutland & Burlington R. R. Co.*, 291.
2. If a court of one state has jurisdiction of the subject-matter of an action against a railroad company, incorporated under the laws of another state, jurisdiction of the person may be conferred by consent; and the consent may be expressed by the corporation appearing by attorney and answering generally in the action. *McCormick v. Pennsylvania Central R. R. Co.*, 429.
3. Where a right of action is given by a statute of a state, whenever the death of a person shall be caused by a wrongful act, neglect, or default, against the person or corporation which would have been liable if death had not ensued, a proviso in such statute requiring such actions to be brought in some court established by the constitution and laws of the state does not prevent a non-resident plaintiff in such an action from removing the action to a circuit court of the United States, under the act of Congress of March 2, 1867. *Chicago & Northwestern R. Co. v. Whitton*, 462.

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BONDS.

1. In an action upon coupons of railroad bonds payable to bearer, the declaration alleged the plaintiff to be the owner, holder, and bearer of the coupons. *Held*, that a plea that the plaintiff was not, either at the time of filing the declaration or the plea, the owner, holder, or bearer, although faulty as argumentative,

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was a traverse of a material allegation of the declaration, and must be sustained as against a general demurrer. *Pendleton County v. Amy*, 109.

2. A plea to the same declaration, that at the times named the bonds and coupons were all the property of one R., a citizen of the same state as defendant, and not of any other person,—*Held*, good, upon general demurrer. *Ib.*
3. The same declaration alleging that the coupons sued on were for interest for bonds that had been issued by a county, and delivered by it to a certain railroad company, in payment by the county of a subscription to stock of the road, under an authority given by acts of the legislature,—*Held*, that a plea that the county did not sign, seal or deliver the bonds and coupons to the company as alleged, and "so that the alleged acts and coupons are not its acts and deeds," was good, upon general demurrer. *Ib.*
4. Bonds issued by a railway company are property in the hands of the holders; and when held by non-residents of the state by which the company was incorporated, they are beyond the jurisdiction of the state, and are not subject to its power of taxation. *Cleveland, Painesville, & Ashtabula R. R. Co. v. State of Pennsylvania*, 368.
5. Hence a state law which requires the treasurer of a railway company, incorporated by and doing business within the state, to retain a percentage of the interest due upon bonds of the company, made and payable out of the state to non-residents, citizens of other states, and held by them, is not a legitimate exercise of the taxing power of the state. It is a law which interferes between the company and the bondholders, and, under pretense of levying a tax, commands the company to withhold a portion of the stipulated interest and pay it over to the state; thus impairing the obligation of the contract between the parties. *Ib.*
6. The facts that such bonds are secured by a mortgage, executed simultaneously with them, upon property of the railway company situated within the state, does not render the bonds liable to taxation by the state, under such a law. *So held*, in regard to a statute of Pennsylvania, in which state a mortgage, though in form a conveyance, is held to be a mere security for a debt, and transfers no estate in the mortgaged premises. Such a right has no locality independent of the party in whom it resides. *Ib.*

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BRIDGES.

1. The charter of a city provided that the common council might, from time to time, order the building, widening, or repairing of all bridges crossing railroads in the city, in such manner as in their judgment public convenience might require; and that, in case any railroad company whose road such bridge crossed should neglect to obey such order, the common council might cause the required work to be done at the expense of the city, and that the treasurer of the city might collect the amount of such expense in an action of trespass on the case in his own name. *Held*, that the word "bridge," as used in the charter, was restricted to the bridge proper, to the exclusion of embankments, filling, and approaches, unless the immediate approach might be included as part of the bridge proper itself; and that, if such approaches were included, the expense of their repair could not be recovered in an action of assumpsit in the name of the city. *City of New Haven v. New York & New Haven R. R. Co.*, 253.
2. Under a provision in a general railroad law requiring every corporation organized under it to erect and maintain farm crossings, &c., for the use of the proprietors of lands adjoining its railroad (*N. Y. Laws of 1850*, ch. 141, § 44), if no election is given in terms to the land-owner for whose use the crossing is to be made, it is the right of the corporation to determine where the crossing shall be located. In the exercise of this right, however, the interest of the corporation is not alone to be considered, but regard must be had to the convenience of both parties, and such a location must be made as will not subject the proprietor to needless and unreasonable injury. *Wademan v. Albany & Susquehanna R. R. Co.*, 259.
3. Where one owning land upon both sides of a railroad brought an action under such a statute to compel the railroad company to construct a suitable farm crossing, also claiming damages, and the court found that the crossing actually built by defendant was inconvenient for plaintiff, and not of easy access, and that the proper place for a crossing was where plaintiff desired, but that the expense of building a new crossing at that point would exceed the amount of the damage to the plaintiff from being confined to the crossing already erected,—*Held*, that a judgment which, instead of directing a specific performance by defendant of its obligation, gave plaintiff a pecuniary compensation, to an

BRIDGES—Continued.

amount less than the cost of erecting a new crossing in the proper place, was not erroneous; where the statute did not forbid the giving of damages for the breach of duty on the part of defendant. *Ib.*

CARRIERS.

1. Where goods are shipped by water addressed to the owner at the ultimate destination, but the carrier by water is directed to deliver them at an intermediate point to carriers by rail, over whose railroad the goods must pass to reach their final destination, and the goods are received by such carriers by rail, with knowledge of these facts, the possession of the goods by such carriers is, *prima facie*, a possession as carriers, and they are responsible as such. *Rogers v. Wheeler*, 411.
2. But, *it seems*, that in a case where, although such property was ultimately to be transported over the railroad, it was not to be have been done immediately, but was to await orders from the owners, the possession of the carriers while thus awaiting directions, would be that of warehousemen. *Ib.*
3. The rule that a railway company is responsible for the safe carriage and delivery of property intrusted to it as a common carrier, unless prevented by the act of God, or the public enemy, does not apply in its full extent to the carriage of live stock. In the transportation of such stock, in the absence of negligence, the carrier is not liable for such injuries as occur in consequence of the vitality of the freight. *Cragin v. New York Central R. R. Co.*, 418.
4. By the terms of a special contract by a railway company to transport a lot of hogs over its road, the shipper assumed the risk of injuries "in consequence of heat." *Held*, that as at common law a railway company, in transporting live stock, could be held liable only for negligence, effect could be given to the contract only by construing it as exempting the railroad company from liability for injuries from heat, the result of negligence. And therefore the company was not liable to an action for damages for the death of some of the hogs, the result of the negligence of its agents in not watering and cooling the hogs by wetting. *Ib.*
5. *It seems*, that a ticket purchased by a passenger from a railway company for passage between two designated points, which on its face purports to be good "only upon presentation of this ticket with checks attached," one of the two checks attached representing a passage over the company's own road, and the other a passage over a connecting railroad, entitles the passenger

CARRIERS—Continued.

only to a single continuous passage over each road, without the right to stop at an intermediate station on either and resume the journey by another train. Even if such a right did exist, the passenger would lose it by voluntarily or negligently detaching the check, and thereby rendering himself unable to present the ticket in the form required by its terms. *Hamilton v. New York Central R. R. Co.*, 423.

6. In an action against a railway company for damages for ejecting a passenger from its train for non-payment of fare, evidence of a conversation between the plaintiff and the conductor of the defendant's train who had ejected the plaintiff, which occurred at another place than, and several hours after, the transaction itself, is not admissible as part of the *res gesta*, nor to show the *quo animo* of the conductor, the defendant being liable only for his acts within the scope of his authority. And even if such evidence is offered and received without objection from the defendant, it is error for the judge to refuse, when requested by the defendant, to instruct the jury that such evidence is not to be taken into consideration. *Ib.*
7. The plaintiff, intending to take passage by the defendant's railroad, presented his baggage to be checked by defendant's baggage-master, but, in compliance with defendant's rules, the baggage-master refused to check it until plaintiff had procured passage tickets. During the absence of plaintiff for the purpose of procuring the tickets, the baggage-master caused the baggage to be placed in the baggage car. When plaintiff returned with his tickets, the baggage master refused to give checks for the baggage unless extra compensation was paid, for the reason that its weight exceeded what was allowed to pass free with the number of tickets purchased by plaintiff. Plaintiff refused to pay, and demanded the checks or his baggage, which was refused; the baggage being so covered by other freight that it could not be reached and removed before the time for starting the train. Plaintiff refused to go upon that train, and his baggage went forward to his destination, where, not being claimed, it was stored by the defendant, and the succeeding night was destroyed by fire. *Held*, that the defendant did not sustain the relation to the plaintiff of a carrier of him and his goods, and could not avail itself of any of the rules as to the liabilities of common carriers of passengers and their baggage. *McCormick v. Pennsylvania Central R. R. Co.*, 429.
8. *Query*, whether, as matter of law, there was a conversion of the plaintiff's trunks by the defendant? *Ib.*
9. *It seems*, that the question whether the reason given for not deliv-

CARRIERS—Continued.

- ering the trunks to plaintiff was such a qualification of the refusal to deliver as would rebut the evidence of conversion, is a question of fact for the jury. *Ib.*
10. *It seems*, that the acts of the baggage-master were within the scope of his authority, and the defendant was liable therefor. *Ib.*
 11. An action may be maintained by a married woman in her own name against a railway company, for injury to her baggage while in charge of the railway company as a common carrier, if such baggage is her separate property under the laws of the state in which she is domiciled, and the laws of the state in which the action is brought permit a married woman to sue when the action concerns her separate property. The *lex loci* does not govern as to her right to the property, but only as to the remedy. *Stoneman v. Erie R. Co.*, 446.
 12. Where a railway company demands and receives from a passenger, besides the fare or passage money, additional compensation as freight for the carriage of packages containing merchandise as well as the personal baggage of the passenger, and there is no evidence of fraud or concealment on the part of the passenger in regard to the contents of the packages, the railway company is liable as a common carrier for any injury to the merchandise as well as to the baggage. *Ib.*
 13. In an action against a railway company to recover damages for the failure of the defendant to deliver within a reasonable time a trunk transported by the defendant as baggage of the plaintiff, a passenger on the defendant's railway, it appeared that the trunk contained masquerade costumes, which the plaintiff had undertaken to furnish for use at a ball, on the evening of the following day; but by the failure of the trunk to arrive in time, the plaintiff lost the benefit of her contract. It was not shown that she had informed defendant's servants of the contents of the trunk, and that it would be required next day. *Held*, that the plaintiff, having shipped as personal baggage merchandise to be used in her trade, which could in no sense whatever be considered personal baggage, the defendant, not having notice of the contents of the trunk, was released from its liability as common carrier. *Michigan Southern & Northern Indiana R. R. Co. v. Oehm*, 451.
 14. In an action to recover from a railway company, the value of a trunk and its contents alleged to have belonged to the plaintiff, and to have been lost while in charge of the defendant as baggage of the plaintiff when a passenger upon the defendant's railway, evidence was given at the trial tending to show that

CARRIERS—Continued.

the trunk belonged to another person, who had taken it away from the defendant's station without the knowledge of the defendant, and had procured the plaintiff to sue for damages for its loss. *Held*, that this evidence of community of interest and design between these parties rendered admissible a letter in evidence which tended to show the existence of the conspiracy between them, written by the owner of the trunk to a stranger. *Chicago, Rock Island, & Pacific R. R. Co. v. Collins*, 458.

15. In an action against a railway company to recover the value of a trunk and its contents alleged to have been lost by the defendant while in its charge as baggage of the plaintiff, a passenger upon the defendant's railway, a verdict for the plaintiff including in the damages the value of two revolvers alleged to have been contained in the lost trunk,—*Held*, erroneous, on the ground that the revolvers were not necessary for the plaintiff's use on his journey; he being a grocer travelling into the country to purchase butter. *Id.*
16. A railway company's liability as a common carrier, for the baggage of a passenger, continues after the passenger has left the train, and until he has had a reasonable time and opportunity to remove his baggage. And it is the duty of the company to have its agent at hand to deliver baggage for a reasonable time after a train has arrived, and at all reasonable hours. *Dinwiddie v. New York & New Haven R. R. Co.*, 457.
17. A passenger by defendant's railway, on arriving at her destination, late in the afternoon, could find no one to deliver her trunk; the defendant's baggage-master having, immediately upon the arrival of the train, placed her trunk in the depot and gone to his home. She waited fifteen minutes, and then went away. Soon afterwards her son procured a conveyance, and went to the depot for the trunk, but found the depot locked and the baggage-master still absent; it being then about eight o'clock in the evening. The son went to the residence of the baggage-master, and inducing him to come to the depot, delivered the check, and the trunk was brought to the door of the depot; but meantime the conveyance had gone, and as no other could be obtained, the trunk was left in charge of the baggage-master, and by him locked up again in the depot. During the night it was broken open, and the contents carried away. In an action against the railway company to recover for the loss, the referee found that the demand for the trunk was made in reasonable time, and reasonable efforts made by the passenger to obtain it, but that there was no delivery by the defendant.

CARRIERS—Continued.

Held, that the findings could not be disturbed, upon questions of law; and under them, the defendant's liability as common carrier had not terminated at the time of the loss. *Id.*

CARS.

That railway cars are personal property, see **TAXES**, 6.

CATTLE.

As to care required in transportation of live stock, see **CARRIERS**, 3, 4.

As to the liability for injuries to cattle at points on a railway not fenced, see **FENCES**.

As to injuries to cattle by negligence, see **NEGLIGENCE**, 16.

CHANCERY.

See **EQUITY**.

CHARTERS.

As to the power to amend railroad charters, see **INCORPORATION**, 1.

As to construction of provisions of charters, see **MORTGAGES**, 10; **STOCK**, 1-9.

CITIZENSHIP.

As to the state of which a railway corporation is deemed a citizen, see **JURISDICTION**, 2, 8.

CONDITIONS.

As to conditions precedent to the construction of a railroad, see **MUNICIPAL CORPORATIONS**, 1.

As to conditional subscriptions to corporate stock, see **STOCK**.

CONNECTING LINES.

As to liability for injury to or loss of goods received to be forwarded by connecting lines, see **CARRIERS**, 1-2.

CONSOLIDATION.

1. Where several railroad companies are consolidated, forming a new company, such consolidated company, so far as concerns the creditors of one of the original companies, is the successor of that company, in respect to the property formerly owned by that company; but in respect to the properties of the other companies, it is a new and independent corporation; such creditors have no claim against it upon their original contracts, but only by virtue of its assumption of the obligations of the
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CONSOLIDATION—Continued.

old companies. *Prouty v. Lake Shore & Michigan Southern R. Co.*, 388.

2. Upon such a consolidation, the officers of the new corporation, so far as the trust devolves upon them of managing property formerly owned by one of the old companies, occupy in relation to its creditors the position of successors to its officers, and are bound by all proceedings had against them; but as to the properties formerly of the other companies they are successors to the officers of those companies, against whom such creditors have no right of action upon their original contracts. *Ib.*
8. Hence, where an action had been brought against a railway company and its officers upon a contract with the company, and such company was consolidated with others into a new corporation after a report of a referee had been made in the action directing judgment for the amount claimed, and restraining defendant from making any dividends until the amount was paid,—*Held*, that a subsequent order, substituting the consolidated company and its officers as defendants, was erroneous, as it made them liable upon the original contracts, and subjected them and all the funds and property of the consolidated company to the restraint adjudged against the old company. *Ib.*

CONSTITUTIONAL LAW.

As to construction of constitutional provisions, see **LANDS**, 4, 17, 21, 22.

CONSTRUCTION.

As to performance of conditions precedent to construction of a railroad, see **MUNICIPAL CORPORATIONS**, 1.

CONTRACTS.

1. A contractor with a railroad corporation who agrees to build a wharf, and to carry on the work under the direction of the company's engineer, and to his satisfaction, acts as the company's agent, and it is liable for any injury resulting from the negligent manner in which the wharf is constructed or protected. *New Orleans, Mobile, & Chattanooga R. R. Co. v. Hanning*, 242.
2. A statute providing that a certain railroad corporation shall not be liable for debt incurred by those who contract with it for building its road, &c., nor for any injury to person or property caused by the act or omission of the persons so contracting

CONTRACTS—Continued.

with it, is merely declaratory of the common law, and confers no exemption on the company. *Ib.*

8. In consideration of the conveyance of certain land to a railway company, the company agreed by parol to deliver to the grantor, for temporary keeping and feeding, all the cattle and other live stock transported on a certain portion of its road, the profits of such keeping and feeding to be realized by him. The company complied with the agreement for more than a year, but afterwards refused to perform it. *Held*, that as the agreement was not to be performed within a year, it was void by the statute of frauds; but that the grantor was entitled to recover from the railway company the value of the land conveyed, deducting therefrom the profits realized by him from the business during the time of the performance of the agreement. Such profits, being a part of the consideration, need not be tendered back to the railway company before bringing suit for the value of the land. *Day v. New York Central R. R. Co.*, 856.
 4. A contract for the transportation of cattle over a railway was entered into between the shipper and an agent of the railway company, who was its agent only for the purpose of procuring cattle shipments over its road. The contract was made with knowledge on the part of the shipper that, by the ordinary routine of such business as transacted by the company, the money for drawbacks from the freight agreed upon would come to him through the hands of such agent, and to that routine the shipper gave his assent. *Held*, that the agent of the company became the agent of the shipper for the purpose of receiving the money, whether the latter gave him distinct authority so to do or not, and a payment of the money, by the company, to such agent, would exonerate it from any further liability to the shipper in respect thereto. And documentary evidence, tending to prove that the company had paid the money to the agent, was admissible in behalf of the company. *Pittsburg, Fort Wayne, & Chicago R. Co. v. Fawcett*, 405.
 5. A contract between a shipper of cattle and a railway company, by which it was agreed that the shipper should be allowed the same drawbacks from the freight charged him upon his shipments which other companies were allowing him,—*Held*, not to relate to shipments made before the contract was entered into, but to future shipments only. *Ib.*
- As to special contracts limiting liability of carrier, see **CARRIERS**, 4.

COUNTIES.

As to the power of counties to aid railroads, see **MUNICIPAL CORPORATIONS**, 2-5, 8, 9.

DAMAGES.

As to damages for failure to construct farm-crossings, see **BRIDGES**, 8.

For ejection of passenger from railway car, see **CARRIERS**, 6.

For injuries to cattle at points on railway not fenced, see **FENCES**.

For injuries resulting from fire communicated from locomotive, see **FIRES**.

As to damages for private property taken for railroad purposes, see **LANDS**, 6-28.

For injuries resulting from negligence, see **NEGLIGENCE**.

DEATH.

As to actions for causing death, see **ACTION**, 8, 4.

DEDICATION.

As to what constitutes dedication of land by a railway company to public use, see **HIGHWAYS**, 4.

DEEDS.

In a case involving the validity of a deed of lands in one state to a railway corporation created by the laws of another state, in the absence of any showing what the consideration for the deed was, if any species of consideration—such as the payment of a debt to the corporation—will support the deed, it will be presumed that it was made for that consideration; courts will not presume illegality. *Thompson v. Waters*, 331.

DEFENSES.

As to defenses in actions on subscriptions to stock, see **STOCK**, 1-16.

In suits to foreclose mortgages, see **MORTGAGES**, 1.

As to when contributory negligence is a defense, see **NEGLIGENCE**, 6-15.

DELIVERY.

As to delivery of goods between connecting carriers, see **CARRIERS**, 1.

As to obligation to deliver passengers' baggage, see **CARRIERS**, 16, 17.

EQUITY.

As to jurisdiction of equity over railroad companies, see **INJUNCTION**;
LANDS, 1; **MORTGAGES**, 2.

As to practice in equity, see **MORTGAGES**, 4-13.

EVIDENCE.

1. In determining the value of land taken for the construction of a railroad, evidence of the price at which the right of way through adjoining tracts was purchased is not admissible, unless a uniformity in character of the lands thus sought to be compared is first shown. *King v. Iowa Midland R. R. Co.*, 199.
2. In an action against a railway company for unlawfully constructing and operating its road over plaintiff's land, evidence that the location and operation of the railroad increased the hazard of fire to the plaintiff's buildings is admissible. *Harrington v. St. Paul & Sioux City R. R. Co.*, 216.
3. In an action to recover from a railway company the value of a trunk and its contents alleged to have belonged to the plaintiff, and to have been lost while in charge of the defendant as baggage of the plaintiff when a passenger upon the defendant's railway, evidence was given at the trial tending to show that the trunk belonged to another person, who had taken it away from the defendant's station without the knowledge of the defendant, and had procured the plaintiff to sue for damages for its loss. *Held*, that this evidence of community of interest and design between these parties rendered admissible a letter in evidence which tended to show the existence of the conspiracy between them, written by the owner of the trunk to a stranger. *Chicago, Rock Island, & Pacific R. R. Co. v. Collins*, 453.
4. In an action against a street railway company, under a statute making the owner of every vehicle running upon any public highway, for the transportation of persons, liable for all damages occasioned by the willful act of any one in his employ as a driver of such vehicle while driving the same, to recover damages for a willful injury inflicted by a driver of the defendant's car, the declarations of the driver are not admissible in evidence against the defendant unless it appears affirmatively that they were made at the time the injury was inflicted. *Whitaker v. Eighth Avenue R. R. Co.*, 476.
5. In an action against a railway company to recover damages for injury resulting from fire communicated from coals dropped by defendant's engine, testimony as to the presence of coals on the track at the time of the fire, or at the place of the fire at other times not remote therefrom, or at once after the passage

EVIDENCE—Continued.

of the particular engine from time to time, is pertinent and proper. *Webb v. Rome, Watertown, & Ogdensburgh R. R. Co.*, 547.

6. In an action against a railway company to recover for damage to property from fire communicated from the defendant's locomotive, brought under a statute which declares that the fact that the fire was communicated from the engine shall be *prima facie* evidence of negligence on the part of the company using the engine, upon proof of that fact, the burden of proving that the locomotive was in good order is upon the defendant. And evidence that, at the time of the injury, the locomotive threw out an unusual quantity of fire, will sustain a verdict for the plaintiff, notwithstanding direct testimony that the locomotive was in good repair, and provided with proper appliances to arrest sparks. *Chicago & Northwestern R. Co. v. McCahill*, 561.
7. In such a case, it is not error to allow a witness, testifying to the loss of articles destroyed by the fire, to refresh his memory from a memorandum of such articles. And evidence of the destruction of articles not included in the declaration is admissible, as part of the *res gesta*; though no damages could be recovered for the loss of such articles. *Ib.*

As to when declarations of officer or employe are admissible against railway company, see **CARRIERS**, 6.

FARM CROSSINGS.

As to the obligation of railway companies to construct farm crossings, see **BRIDGES**, 2, 8.

FENCES.

1. Under a statute which requires railway companies to erect and maintain fences and cattle-guards along their tracks, and makes them liable for injuries to cattle from their engines, cars, &c., at points not sufficiently fenced, without other evidence of negligence causing the injury, where a railway company has not the exclusive right of way, as where its road runs along instead of across an alley, upon which others have a right to pass as well as the railway company, the latter, under such circumstances, can not legally construct fences or cattle-guards along its track, and is liable for injuries to cattle upon its track at such a point only when it is guilty of negligence. *Indianapolis, Cincinnati, & Lafayette R. R. Co. v. Warner*, 537.
2. Under the statute of Indiana, making railway companies liable for injuries to stock upon railroads not securely fenced, in an action to recover damages for such injuries, the complaint

FENCES—Continued.

must allege that the road was not securely fenced. An averment that the road "was not fenced according to law," is not sufficient. *Indianapolis, Cincinnati, & Lafayette R. R. Co. v. Robinson*, 544.

8. Independent of such a statute, a complaint against a railway company in an action for damages for negligently killing stock, which does not allege that the injury did not result from the negligence of the plaintiff, is not good at common law. *Id.*

As to compensation for obstruction caused by fences required by law, see **LANDS**, 14.

FIRES

1. During a long-continued and extreme drouth, and while a strong wind was blowing from the line of the defendant's railroad in the direction of the plaintiff's woodland adjoining, a locomotive of the defendant's dropped live coals upon the track opposite plaintiff's woodland. The coals set fire to a tie on the track, and thence the fire was communicated to an old tie and to an accumulation of grass, weeds, and rubbish on defendant's land beside the track, whence the fire spread to plaintiff's fence, and upon his land, burning trees and soil. *Held*, that the damage suffered by the plaintiff was not so remote as to relieve the defendant from liability on the ground of negligence in setting the fire. *Webb v. Rome, Watertown, & Ogdensburg R. R. Co.*, 547.
2. The act of negligence of the defendant consisted not merely in suffering the coals to drop from the engine. The continued and extreme dryness of the atmosphere and of the earth and its herbage, and of all matter that was upon the earth at that place; the blowing of the wind with the strength it did, and in the direction it did; the accumulation of weeds, grass, and rubbish by the side of the defendant's track, between it and the plaintiff's land, were all constituents of the act of the defendant, and went together to make it negligent. The result was an ordinary, usual, and necessary result, and reasonably to be expected. And the question of negligence, under the circumstances, was properly submitted to the jury. *Id.*
3. On the trial of such an action, testimony as to the presence of coals on the track at the time of the fire, or at the place of the fire at other times not remote therefrom, or at once after the passage of the particular engine from time to time, is pertinent and proper. *Id.*
4. The English statutes of Anne (6 Anne, ch. 31, § 67) and of George III. (14 Geo. III. ch. 78, § 76)—which provide for ex-

FIRES—Continued.

emption from liability for fires accidentally begun,—even if they are part of the common law of New York, do not afford any defense to one who negligently sets or manages a fire by the spread of which damage is caused to his immediate neighbor. *Ib.*

5. In an action against a railway company to recover for damage to property from fire communicated from the defendant's locomotive, brought under a statute which declares that the fact that the fire was communicated from the engine shall be *prima facie* evidence of negligence on the part of the company using the engine, upon proof of that fact, the burden of proving that the locomotive was in good order is upon the defendant. And evidence that, at the time of the injury, the locomotive threw out an unusual quantity of fire, will sustain a verdict for the plaintiff, notwithstanding direct testimony that the locomotive was in good repair, and provided with proper appliances to arrest sparks. *Chicago & Northwestern R. Co. v. McCahill*, 581.
6. In such a case, it is not error to allow a witness, testifying to the loss of articles destroyed by the fire, to refresh his memory from a memorandum of such articles. And evidence of the destruction of articles not included in the declaration is admissible, as part of the *res gestæ*; though no damages could be recovered for the loss of such articles. *Ib.*

FORECLOSURE.

As to proceedings to foreclose mortgages of railway property, see MORTGAGES, 1-3.

GRANTS.

As to construction and effect of grants of land to railways, see LANDS, 1-5.

HIGHWAYS.

1. In Minnesota, the owners of lands abutting upon streets in a town own the fee in such streets to the center thereof, subject to the public easement for a highway, whether a statutory or common-law dedication of such streets be shown; and the legislature can not appropriate the street to any other use, or subject the land to any additional servitude, such as using the street for a railroad, without compensation to the owner of the fee. *Harrington v. St. Paul & Sioux City R. R. Co.*, 216.
2. The construction and operation of a railroad over a public street,

HIGHWAYS—Continued.

- the fee of which is in the owners of the lands abutting upon such street, without compensation to them, constitutes a private nuisance as to such owners, and such acts of the railway company may be restrained by injunction. *Id.*
3. Under the statutes of Iowa defining the jurisdiction of the circuit courts (*Iowa Laws of 1868*, ch. 86, p. 113), those courts have no jurisdiction of proceedings by trustees of a town to compel a railway company to make further alterations or amendments in a highway, over or under which the railway company has constructed its road, under *Iowa Rev. §§ 1321, 1322. Kennedy v. Dubuque, C. & M. R. R. Co.*, 249.
 4. A railroad company purchased a strip of land in front of its passenger station and freight depot, making an open space afterwards connected at each end with a public street of the town. The public used the place constantly and freely, both in going to and from the railroad station and depot, and in passing from one part of the town to another. One who, subsequent to these acts, had purchased land adjoining this space, regarding it as a public way, erected a restaurant and other buildings fronting upon it, and he and the railroad company laid sidewalks, cross-walks, and gutters, and made and allowed the authorities of the town to make other improvements upon the open space referred to. Several years afterwards the railroad company undertook to remove a portion of the sidewalk so laid, for the purpose of making more room for carriages in front of the passenger station. Upon a bill in equity filed by the owner of the adjoining land for an injunction against the removal of the sidewalk,—*Held*, that the circumstances of the case did not show that the railroad company had dedicated the land to public use, nor that the public had accepted it. And the railroad company was not estopped from denying that there was any dedication. *Williams v. New York & New Haven R. R. Co.*, 264.
 5. Where a statute authorized the construction of streets and highways across a "railroad track," without compensation to the owners of the track,—*Held*, that the word "track" should be limited to the track used for public traffic and for turn-outs and switches, and did not include tracks used for storing cars, or exclusively for making up trains. But a finding that certain tracks across which it was proposed to lay out a street were in "constant use for passing trains, and for switching off cars and making up trains," would not relieve the premises from the operation of the statute. *Boston & Albany R. R. Co. v. Greenbush*, 336.

HIGHWAYS—Continued.

As to the necessity of fencing railroads along highways, see FENCES, 1.

As to when a street railway is a public highway, see NEGLIGENCE, 2.

INCORPORATION.

1. The power to alter, modify, or repeal an act of incorporation may be reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of such acts, as well as by an express reservation in any particular charter; and the reserved power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. *Miller v. State of New York*, 23.
2. Under a statute providing for the incorporation of railway companies,—which requires at least one thousand dollars stock to be subscribed for each mile of the proposed railroad, and ten per cent. thereof, in cash, to be actually and in good faith paid in before incorporation (*Cal. Stat.* 1861, 607),—such requirements are not merely directory, but are conditions precedent, the performance of which is essential to the validity of the act of incorporation. *People of California ex rel. Plumas County v. Chambers*, 49.
3. A payment of the ten per cent. required, in a check upon a bank, drawn by a person who has not on deposit in such bank funds sufficient to meet the check, is not a payment in cash, as required by the statute, even though such check would have been paid by the bank if presented; and an incorporation founded on such payment is invalid, and will be so declared on *quo warranto*. *Ib.*
4. Although the legal existence, by force of obligatory law, of a railway corporation is confined to the state which has created it and endowed it with its powers, capacities, and rights, and can only exercise those powers, capacities, and rights, in another state by permission of the authorities of such state, the mere right to purchase and sell property, not being in its nature a franchise, but a right existing also in individuals without special grant, will generally be recognized and protected in other states than that by which the corporation was created. *Thompson v. Waters*, 831.
5. The courts of one state will recognize the right of corporations of another state to realize and collect the debts due to them, by receiving a conveyance of lands in the former state, unless

INCORPORATION—Continued.

the constitution or the legislature have, either expressly or by clear implication, declared a contrary rule. Such a right is not in any way dangerous to the citizens or inconsistent with the public policy of any state. Nor is there any distinction between the rights of railroad corporations in that regard and those of other corporations. *Ib.*

6. Where rights of action are to be enforced by or against a railway company in the courts of the United States, it will be considered a citizen of the state by which it was incorporated, within the clause of the constitution of the United States extending the judicial power of the United States to controversies between citizens of different states. *Chicago & Northwestern R. Co. v. Whitton*, 462.
7. It is no objection to the jurisdiction of a United States circuit court over an action brought by a citizen of one state against a railway company incorporated by the state in which the court is held, that the defendant is also a corporation under the laws of the state of which the plaintiff is a citizen, and, is, therefore, a citizen of the same state. The defendant can only be brought into court as a citizen of the state in which it is sued, whatever may be its status or citizenship elsewhere. *Ib.*

As to construction and effect of acts of incorporation, see **MORTGAGES**, 10.

As to what constitutes a corporation *de facto*, see **STOCK**, 10-12.

INDIVIDUAL LIABILITY.

As to the liability of stockholders for debts of railway companies, see **STOCK**, 5, 18-20.

INFANTS.

As to what want of care on the part of a child constitutes negligence contributing to an injury, see **NEGLIGENCE**, 9.

INJUNCTION.

1. An injunction to restrain the construction and operation of a railroad over a public street, the fee of which is in the owners of the land abutting upon such street, where no compensation has been made to such adjoining owners, will be granted upon their application. It is no ground for refusal, that there is an adequate remedy at law under the provisions of the charter of the railroad company for awarding compensation for lands taken, if such proceedings are authorized to be instituted by the railroad company only, and not by the land owners. Nor

INJUNCTION—Continued.

can the land owners, by mandamus, compel the railroad company to institute such proceedings. *Harrington v. St. Paul & Sioux City R. R. Co.*, 216.

2. Where, in such a case, a perpetual injunction would have occasioned great inconvenience to the public, as well as to the railroad company, and the company might still proceed to obtain the right of way upon making compensation therefor,—*Held*, that judgment should be entered that an injunction do not issue if the defendant should forthwith institute proceedings to obtain the right of way, and promptly prosecute the same; otherwise to be considered as granted as of the date of the judgment. *Id.*

INTEREST.

Where a mortgage upon railroad property is both executed and made payable, in a state other than that in which the property is situated, the mortgage will not be deemed invalid, because the rate of interest fixed thereby is higher than is allowed by the laws of such state, if it is apparent that the parties intended to contract with reference to the laws of the state in which the railroad mortgaged is situated. Such intent is established beyond question by a specific reference in the instrument itself to a statute of the latter state allowing railroad companies to pay the rate of interest agreed upon. And interest after the maturity of the obligations secured by the mortgage should be allowed at that rate, not at the lower rate fixed by the general law. But the interest upon coupons not paid when due, as to which there is no stipulation by the parties, should be estimated at the ordinary legal rate. *Chester v. Rutland & Burlington R. R. Co.*, 291.

JURISDICTION.

1. If a court of one state has jurisdiction of the subject-matter of an action against a railroad company, incorporated under the laws of another state, jurisdiction of the person may be conferred by consent; and the consent may be expressed by the corporation appearing by attorney and answering generally in the action. *McCormick v. Pennsylvania Central R. R. Co.*, 429.
2. Where rights of action are to be enforced by or against a railway company in the courts of the United States, it will be considered a citizen of the state by which it was incorporated, within the clause of the constitution of the United States extending the judicial power of the United States to controversies be-

JURISDICTION—Continued.

tween citizens of different states. *Chicago & Northwestern R. Co. v. Whitton*, 462.

3. It is no objection to the jurisdiction of a United States circuit court over an action brought by a citizen of one state against a railway company incorporated by the state in which the court is held, that the defendant is also a corporation under the laws of the state of which the plaintiff is a citizen, and, is, therefore, a citizen of the same state. The defendant can only be brought into court as a citizen of the state in which it is sued, whatever may be its status or citizenship elsewhere. *Ib.*
4. Where a right of action is given by a statute of a state, whenever the death of a person shall be caused by a wrongful act, neglect, or default, against the person or corporation which would have been liable if death had not ensued, a proviso in such statute requiring such actions to be brought in some court established by the constitution and laws of the state does not prevent a non-resident plaintiff in such an action from removing the action to a circuit court of the United States, under the act of Congress of March 2, 1867. *Ib.*
5. The act of Congress of March 2, 1867, allowing such a removal of an action brought by a non-resident plaintiff, upon petition of the plaintiff, is constitutional and valid. *Ib.*

As to jurisdiction of proceedings to compel alterations in a highway by a railway company, see **HIGHWAYS**, 3.

LANDS.

1. A suit by a receiver of a railway company, to restrain officers of a state from granting away lands previously granted to the company, may be sustained in a circuit court of the United States, under the general equity jurisdiction of the national courts, and without reliance upon any statute of the state authorizing such suits by receivers. *Davis v. Gray*, 134.
2. Such a suit may be maintained in a United States court against the governor or other public officers of a state, who appropriately represent the state in regard to the interests involved in the controversy, if, according to the jurisprudence of the state, similar suits could be sustained in the courts of the state. *Ib.*
3. Where a large grant of lands has been made to a railroad corporation by a state, defeasible if certain conditions are not performed within a certain time by the company, and the subsequent secession of the state and war ensuing render the fulfillment of the conditions by the company impossible, from the action of the state itself, the conditions are abrogated at law:

LANDS—Continued.

- but in equity, performance of the conditions, within a reasonable time after the disability ceases, may be imposed. *Ib.*
4. The franchise and land grant and land reservation granted to a particular railroad company in its charter by the state of Texas, —*Held*, not forfeited by the failure of the company to comply with certain conditions in its charter, in view of the secession of the state, and the existence of rebellion, and of several statutes of the state condoning the non-compliance with such conditions; and provisions of the constitution of Texas of 1869 (arts. V., VII.), which assume to make a different disposition of the land granted, —*Held*, void, as violating the contract obligations of the charter. *Ib.*
 5. Where the act of Congress granting lands to a railroad corporation to aid in the construction of its road requires prepayment by the company of the cost of surveying, selecting, and conveying the lands granted before any of the lands shall be conveyed, and also provides that any of the lands granted and not sold by the company within three years after the final completion of the road shall be liable to be sold to actual settlers under the pre-emption laws at a price named per acre, the money to be paid to the company, the title does not pass from the United States to the company, in the first instance, unless there be the required prepayment, nor in the second instance at all, in such way as to subject the land to taxation by a state as the property of the company; and a sale of such lands for taxes is void. The power of a state to tax lands sold by the United States before the government has parted with the legal title by issuing a patent, extends only to cases where the right to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right. *Kansas Pacific R. Co. v. Prescott*, 166.
 6. In proceedings by a railroad company to acquire the right of way for its road over lands owned by individuals, the petition must allege that the taking of such lands for the purposes of the railroad company is necessary for the public use. *Grand Rapids, Newaygo, & Lake Shore R. R. Co. v. Van Driele*, 171.
 7. In such proceedings, a finding by a jury "that it was and is necessary to take and use said land for the purpose of operating and constructing said railroad by said company," is not a sufficient finding that the taking of such property is necessary for the public use. *Ib.*
 8. Where a part of a tract of land owned by an individual is taken for the construction of a railway, and the shape of the portion which remains is irregular and inconvenient, the owner is en-

LANDS—Continued.

titled to compensation for the damage resulting from such inconvenient shape. But if, subsequently, a part of the land remaining is sought to be taken by the same railway company, *it seems*, that compensation should not be allowed a second time for the irregularity in shape of the remainder. *Lake Superior & Mississippi R. R. Co. v. Grove*, 173.

9. Where a statute authorizing a railway company to take lands of individual owners for the purposes of its road provides that upon payment of the compensation determined upon, the company shall become invested and seized of the title of the land, and entitled to full, free, and perfect use and occupancy of the same, for the purposes of a railroad, there is no right remaining in such an owner, part of whose land has been taken, to flow the land taken, in using a water power appurtenant to the remainder of the land. And if the taking of part of the land injures or wholly destroys the use of such water power, the owner is entitled to full compensation for the injury. *Ib.*
10. Upon appeal from awards of compensation for several separate pieces of property of the same owner, taken for railway purposes, an objection that the jury awarded a sum in gross instead of separate compensation for each parcel, is not available if not taken to the award when made. *Ib.*
11. Upon appeal from an award by commissioners of compensation to an owner of land taken for or damaged by the construction of a railway, the land owner holds the position of plaintiff, and is entitled to open and close. *Minnesota Valley R. R. Co. v. Doran*, 187.
12. That the owner of land across which a railway company has located and constructed its road has sold large quantities of wood and ties to the company, and has realized large profits therefrom, in consequence of the location of the railroad across his land, does not constitute a benefit to him which may be allowed in recoupment of damages to his land resulting from the construction of the railroad. *Ib.*
13. Although in estimating the compensation to be allowed for injury to lands from the construction of a railroad, mere inconvenience in crossing the track is not a proper item, necessary delay and labor in opening and shutting gates and taking down and putting up bars may properly be considered. *Ib.*
14. Where a railway company is required by law to build and maintain a legal fence on each side of its railroad through improved lands, for the protection and benefit of the owner of such lands, if such fences constitute a further obstruction to the use of the lands by the owner, in addition to the injury result-

LANDS—Continued.

- ing from the construction of the road itself, in determining the compensation to be awarded him, such fences may properly be considered as an element of damage. *Ib.*
15. In determining the compensation to be awarded for lands appropriated for the construction of a railroad, evidence of damages resulting from the negligent or defective construction of the railroad is not admissible, under a statute providing that the owner shall be compensated for the damage he "will sustain by the appropriation of his land." Such damages may be recoverable in a proper action therefor, but they do not constitute an element of the value of the land, or of the compensation to be allowed the owner. *King v. Iowa Midland R. R. Co.*, 199.
 16. Thus, the fact that the railroad was constructed in such a manner that water falling upon the land appropriated was conducted upon adjoining lands of the former owner to the injury of his crops thereon, is not proper to be considered. Nor can the failure of the railroad company, for a time, to construct cattle-guards, as required by law, so that the remaining lands of the former owner are thrown open and left unfenced, be included in estimating the compensation. *Ib.*
 17. In determining the value of land taken for the construction of a railroad, evidence of the price at which the right of way through adjoining tracts was purchased, is not admissible, unless a uniformity in character of the lands thus sought to be compared, is first shown. *Ib.*
 18. In proceedings to determine the compensation to be awarded for land taken for railway purposes, the court may, in its discretion, send the jury to view the land in question. *Ib.*
 19. A provision in a railway charter requiring that in awarding compensation for lands taken for the purposes of the railway, the value of the lands shall be appraised at the time they are entered upon and taken, does not contemplate an appraisal at the time the lands are entered upon for the survey and location of the road, merely, but at the time when the property is actually appropriated to the use of the railroad company. *Hursh v. First Division St. Paul & Pacific R. R. Co.*, 204.
 20. The legislature can not confer power upon a railway company to take and use private property without making or securing compensation therefor. And provisions of the charter of a railway company, purporting to authorize the company, after entering upon and taking lands of individuals, to have, hold, possess, occupy, use, and enjoy the same for any of its lawful purposes, from the time of such entry and taking until the

LANDS—*Continued.*

- proceedings contemplated by the charter to be instituted by the company, to ascertain the value of such lands, shall have been finally determined, and until the company shall have refused, after demand made, to pay such value to the owner; and that during such time, and until such refusal, the company shall not be disturbed in such possession, or occupancy, or use, or enjoyment, by any proceedings, either in law or equity, are unconstitutional and void. *Ib.*
21. *It seems*, that payment of the value of the land actually taken to the owner, is not sufficient to satisfy the requirement of the constitution of the United States, that private property shall not be taken for public use without just compensation. The value of the property taken may be no measure of the injury sustained by the owner. *Ib.*
22. Even if the value of the property taken could, in any case, amount to compensation to the owner, an award and tender of such value, with interest from the time of the taking, made after the commencement of an action by the owner against the railway company, for entering upon and taking his land, does not constitute a defense to the action; and a motion for leave to file a supplemental answer, setting up such an award, since the answer, and making tender of the amount awarded, is properly denied. *Ib.*
23. Where, after an action is commenced against a railway company for injury to lands of the plaintiff, part of the land is sold and conveyed by the plaintiff, the defendant can not avail itself of that fact as a defense unless it be set up by supplemental answer. *Harrington v. St. Paul & Sioux City R. R. Co.*, 216.
24. In an action against a railway company for unlawfully constructing and operating its road over plaintiff's land, it is no defense that, before the plaintiff became the owner of the land, the defendant had entered upon the land and located and marked out the line of its road thereon. *Ib.*
25. In such an action, evidence that the location and operation of the railroad increased the hazard of fire to the plaintiff's buildings is admissible. *Ib.*
26. In Minnesota, the owners of lands abutting upon streets in a town own the fee in such streets to the center thereof, subject to the public easement for a highway, whether a statutory or common-law dedication of such streets be shown; and the legislature can not appropriate the street to any other use, or subject the land to any additional servitude, such as using the street for a railroad, without compensation to the owner of the fee. *Ib.*

LANDS—Continued.

27. The construction and operation of a railroad over a public street, the fee of which is in the owners of the lands abutting upon such street, without compensation to them, constitutes a private nuisance as to such owners, and such acts of the railway company may be restrained by injunction. *Ib.*
28. An action to recover damages from a railway company for injuries to the plaintiff's land, resulting from the land being flooded by water dammed by an embankment and bridge of the defendant's railroad, constructed by a former owner of such railroad, before conveyance to the defendant, can not be sustained by proof merely of the continuance of the structure by the defendant. Notice or knowledge of its existence must also be shown. But a request to abate the nuisance is not necessary. *Conhocton Stone Road v. Buffalo, New York, & Erie R. Co.*, 232.
29. A railroad company purchased a strip of land in front of its passenger station and freight depot, making an open space afterwards connected at each end with a public street of the town. The public used the place constantly and freely, both in going to and from the railroad station and depot, and in passing from one part of the town to another. One who, subsequent to these acts, had purchased land adjoining this space, regarding it as a public way, erected a restaurant and other buildings fronting upon it, and he and the railroad company laid sidewalks, cross-walks, and gutters, and made and allowed the authorities of the town to make other improvements upon the open space referred to. Several years afterwards the railroad company undertook to remove a portion of the sidewalk so laid, for the purpose of making more room for carriages in front of the passenger station. Upon a bill in equity filed by the owner of the adjoining land for an injunction against the removal of the sidewalk,—*Held*, that the circumstances of the case did not show that the railroad company had dedicated the land to public use, nor that the public had accepted it. And the railroad company was not estopped from denying that there was any dedication. *Williams v. New York & New Haven R. R. Co.*, 264.
30. Although the legal existence, by force of obligatory law, of a railway corporation is confined to the state which has created it and endowed it with its powers, capacities, and rights, and it can only exercise those powers, capacities, and rights in another state by permission of the authorities of such state, the mere right to purchase and sell property, not being in its nature a franchise, but a right existing also in individuals

LANDS—*Continued.*

without special grant, will generally be recognized and protected in other states than that by which the corporation was created. *Thompson v. Waters*, 331.

81. This principle is applicable to the power of a railway corporation to take, hold, and convey lands, that being among the powers or capacities incident to a corporation at common law, without special mention in its charter. Hence, where a corporation is created in one state, with powers, so far as that state can give them, of taking, holding, and conveying lands in another state where the legislature have not expressly or by implication forbidden it, an affirmative enabling act is not necessary to give them the capacity to take, hold, and convey lands in the latter state; this capacity rests upon the same principles of comity as their capacity to make or enforce contracts, or to acquire, hold, and convey personal property. *Ib.*
82. In a case involving the validity of a deed of lands in one state to a corporation created by the laws of another state, in the absence of any showing what the consideration for the deed was, if any species of consideration,—such as the payment of a debt to the corporation,—will support the deed, it will be presumed that it was made for that consideration; courts will not presume illegality. *Ib.*
83. The courts of one state will recognize the right of corporations of another state to realize and collect the debts due to them, by receiving a conveyance of lands in the former state, unless the constitution or the legislature have, either expressly or by clear implication, declared a contrary rule. Such a right is not in any way dangerous to the citizens or inconsistent with the public policy of any state. Nor is there any distinction between the rights of railroad corporations in that regard and those of other corporations. *Ib.*

LOCATION.

1. The general railroad law of New York,—which provides that any person feeling aggrieved by the proposed location of a railroad, may apply for the appointment of commissioners to examine the proposed route, and to affirm or alter it, as may be consistent with the just rights of all parties and the public,—does not restrict the power of the commissioners over the proposed route to that part of it which lies within the bounds of the lands of the party procuring their appointment. They may make any alteration of the proposed route, within the county, that may be necessary to obviate such objections of the party aggrieved as they may decide to be well founded. And it is

LOCATION—Continued.

their duty to complete the alteration so as to preserve the continuity of the line. *People ex rel. Erie & Genesee Valley R. R. Co. v. Tubbs*, 127.

2. *It seems*, that the statute contemplates but one board of commissioners in each county; and the board so appointed should therefore complete its work, either by affirming the route proposed by the company, or by making all necessary alterations; and when this is done, the route through the county is established. *Ib.*

As to the location of farm-crossings, see **BRIDGES**, 2, 3.

MANDAMUS.

1. Municipal bonds, issued and deposited with the treasurer of a state, under a statute authorizing such issue and deposit for the purpose of aiding a railway company, are received by him in his official capacity; and where such statute is afterwards adjudged unconstitutional, and the bonds void, he is officially responsible for their safe keeping and return to the makers, when demanded. *People of Michigan ex rel. La Grange Township v. Treasurer of Michigan*, 116.
2. If the return of the bonds, under such circumstances, is refused, upon a reasonable demand, *mandamus* is the proper proceeding to compel their return. It is the proper remedy for enforcing a specific legal right, for which there is no other adequate legal remedy, and is not excluded by other legal remedies which are not adequate to secure the specific relief needed, such as replevin; nor by the existence of a specific remedy in equity. A party will not be compelled to give up a legal remedy for an equitable one. *Ib.*

MARRIED WOMEN.

An action may be maintained by a married woman in her own name against a railway company, for injury to her baggage while in charge of the railway company as a common carrier, if such baggage is her separate property under the laws of the state in which she is domiciled, and the laws of the state in which the action is brought permit a married woman to sue when the action concerns her separate property. The *lex loci* does not govern as to her right to the property, but only as to the remedy. *Stoneman v. Erie R. Co.*, 446.

MORTGAGES.

1. Where negotiable bonds of a railroad company secured by mortgage are in the hands of a *bona fide* holder for value, and a bill

MORTGAGES—Continued.

is filed by him to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed in an action at law upon the bonds. *Kenicott v. Wayne County*, 93.

2. Upon sale on execution of a railroad, upon which there were two mortgages, it was bought in by the holders of certain bonds secured by the second or junior mortgage. These purchasers organized themselves into a corporation, and managed the road for themselves. Afterwards, proceedings were commenced to foreclose the first or senior mortgage; and to prevent a sale of the road under foreclosure, the new corporation paid off the debt secured by that mortgage. Subsequently to this, the sale upon execution, made to the creditors under the second mortgage, was set aside, as fraudulent and void as against other creditors of the corporation which originally owned the road. *Held*, that a bill in equity by the new corporation against the mortgagees under the first mortgage, to recover back, as paid under a mistake of fact, what had been thus paid to them by the new corporation, or to be subrogated to their decree of foreclosure, could not be sustained. *Milwaukee & Minnesota R. R. Co. v. Soutter*, 277.
3. A bill filed by stockholders and creditors of a railroad company to set aside a sale of the railroad under an amicable foreclosure of a certain mortgage upon it, effected with the consent of a majority of the stockholders and creditors, which charged collusion in the sale, and prayed for a resale.—*Held*, fatally defective for want of proper parties, because neither the trustees in the mortgage foreclosed nor the consenting stockholders were made parties. *Ribon v. Chicago, Rock Island, & Pacific R. R. Co.* 285.
4. The trustees under three successive mortgages of the property of a railway corporation filed a bill in equity against the corporation to settle and establish the powers and duties of the trustees and the relative position and rights of the mortgagees towards each other and towards the corporation in respect to the title, possession, and control of the property, and a decree was made in accordance with the prayer of the bill, but was never completely executed. *Held*, that the fact that this suit was still technically pending did not defeat a suit brought many years afterwards by the trustees under the first mortgage, to enforce their security against the second mortgage interest. The circumstances that many of the parties to the former suit were dead, that the former decree was dormant, and that it was repudiated by the second mortgage interest, as a fraud

MORTGAGES—Continued.

upon them, rendered proper an original bill setting forth the original cause of action as well as the suit and decree thereupon. *Cheever v. Rutland & Burlington R. R. Co.*, 291.

5. Trustees in a mortgage of the property of a railroad company, who appear and answer in a suit to enforce the security of a prior mortgage, thereby waive any defect in the service of process upon them. Their power to waive such defect is not affected by the fact that they are representative defendants. *Ib.*
6. In a suit in equity to enforce a railway mortgage security against second mortgage interests, holders of bonds of the railway company secured by such second mortgage who are not trustees under the mortgage are proper, but not necessary parties. And the fact that the bill filed is in the nature of a supplemental bill in a former suit does not render it necessary that all the bondholders who were joined in such former suit should be made parties. *Ib.*
7. A mortgage of the property of a railroad company, which is executed by the president of the corporation in pursuance of a vote empowering him to execute and deliver the instrument in the name of the corporation, but not directing where he shall execute it, is not invalid because executed in a state other than that in which the railroad is situated and by which the company was incorporated; especially where the validity of the deed has subsequently been recognized by the corporation. *Ib.*
8. Nor does the fact that such mortgage allows the trustees under it to be residents of such other state affect its validity, on the ground that such a provision is against public policy. *Ib.*
9. Where such a mortgage is both executed and made payable in such other state, it will not be deemed invalid, because the rate of interest fixed thereby is higher than is allowed by the laws of such state, if it is apparent that the parties intended to contract with reference to the laws of the state in which the railroad mortgaged is situated. Such intent is established beyond question by a specific reference in the instrument itself to a statute of the latter state allowing railroad companies to pay the rate of interest agreed upon. And interest after the maturity of the obligations secured by the mortgage should be allowed at that rate, not at the lower rate fixed by the general law. But the interest upon coupons not paid when due, as to which there is no stipulation by the parties, should be estimated at the ordinary legal rate. *Ib.*
10. Where trustees under a mortgage of a railroad are, by the express terms of the mortgage, authorized, upon certain conditions, to enter upon and manage the railroad for the benefit of

MORTGAGES—Continued.

their trust, subsequent legislation can not impair their remedy or force upon them a substitute for it. Holders of bonds secured by a second mortgage are liable, the same as the railway company itself, to be ousted from possession by the trustees of the first mortgage; and an act incorporating such second mortgagees, with others, into a new company, can not confer upon the new corporation any rights of possession conflicting with the rights of the first mortgage trustees under the original contract. Such an act of incorporation will not be construed as attempting to confer such rights if it is reasonably susceptible of any other interpretation. *Ib.*

11. The rights of the trustees under such first mortgage can not be waived by a majority of the holders of bonds secured by the mortgage. Their rights are for the security of the whole debt, not merely a majority of it. The fact that the security is ample does not affect the case. *Ib.*
12. Upon a bill in equity to enforce a trust, under a clause of a mortgage of the property of a railway company, providing that the trustees under the mortgage might pursue their security by entering upon, managing, and controlling the railroad, until the debt secured should be paid from the earnings of the road or otherwise,—*Held*, that as, upon all the circumstances of the case, nothing was shown to defeat the perfected right of the plaintiffs, under the terms of their deed, to the possession, and to hold it until their debt should be paid, the defendants were not entitled, on a merely general allegation that an accounting was necessary, to retain possession until an account could be taken, and until the expiration of a day of redemption to be fixed by the court. Such a delay, although proper upon a bill to foreclose, is inconsistent with the remedy stipulated by the parties, and sought by the plaintiffs, and would be a denial of the plaintiffs' just rights. *Ib.*
13. But where it appeared in such a case that payment of the debt secured would probably be made without delay, and that the transfer of so large a property would involve considerable expense and might tend to retard instead of hastening payment,—*Held*, that the transfer might properly be delayed a reasonable time to enable the defendants to make complete payment. *Ib.*

As to taxation of bonds secured by mortgages upon railway property, see **TAXES**, 3-5.

MUNICIPAL CORPORATIONS.

1. Where the legislature has authorized a railroad company to proceed in the construction of a division of its line, and to collect

MUNICIPAL CORPORATIONS—Continued.

the subscriptions to its stock made along such division, so soon as a certain amount of subscriptions assessable for the construction of such division is obtained, reckoning as part of that amount such aid as may be voted by any municipality along such division, the fact that such municipal aid is afterwards held void by the courts does not affect the authority to proceed with the construction of such division. That the conditions prescribed by the legislature to the exercise of corporate powers have proved of no value does not take away the powers conferred. *Swartwout v. Michigan Air Line R. R. Co.*, 63.

2. The legislature of a state, in which general legislative power is vested by the state constitution, and which is not restrained therefrom by any constitutional prohibition, may authorize a county to aid the construction of a railroad by issuing county bonds and making them a donation to the railroad company, even although the railroad is wholly outside the county and outside the state, if the purpose of the road be of public interest to the people of such county. *Chicago, Quincy & Burlington R. R. Co. v. Otoe County*, 82.
3. A special act of a state legislature authorizing the issue of bonds by a county, without complying with the requirements of a previous statute, is not necessarily invalid. Such requirements may be abrogated or annulled by subsequent legislation. *Ib.*
4. A state statute authorizing any county, through which a railroad may run, to aid in the construction of the road, does not require that the road to be aided should be actually built before the aid shall be given. Such an act implies that the aid is to be given before the road is built; and the counties giving the aid are to take the ordinary risk of the success of the undertaking in which they embark their property. *Kenicott v. Wayne County*, 98.
5. The charter of a railway company provided that any county through which its road might run, "and every county through which any other railroad may run with which this road may be joined, connected, or intersected," might aid in the construction of such road. Another company was chartered to build a railroad from one terminus of the road of the former company completely through a county adjoining the county in which the former road lay. The company first chartered undertook the construction of the new road from the terminus of its own road onwards completely through the other and adjoining counties. *Held*, that the grant of authority to construct the connecting road, and the entering into a contract

MUNICIPAL CORPORATIONS—Continued.

for its construction, constituted a connection, within the meaning of the provision of the charter cited. *Ib.*

6. Where an act of the legislature empowers cities, towns, and townships to subscribe to the stock of a railroad company, when authorized by a majority of the legal votes of the particular city, town, or township, but prescribes no mode in which such election shall be held, an election under the act must be conducted in the manner prescribed by the law of the organization of the body in which it is held. Thus, an election in a township for such purpose should be held in the manner in which township elections are required to be held in electing town officers, and not in the manner prescribed by the general election laws. *People of Illinois ex rel. Chicago & Rock River R. R. Co. v. Dutcher*, 103.
7. Where a statute, empowering a town to subscribe to the stock of a railroad company, when authorized by a majority of the legal voters therein, requires the town supervisor to make the subscription if it be so voted, but leaves the question of subscription wholly to the determination of the voters, the town may, in determining that question, impose conditions upon its subscription, although a conditional subscription is not expressly authorized by the statute. And, if conditions are imposed, the town supervisor has no power to disregard them, nor can the railroad company compel him, by mandamus, to make an unconditional subscription. *Ib.*
8. Where a state legislature has authorized a county to issue negotiable bonds in payment of a subscription to the stock of a railroad corporation, which subscription and issue of stock are authorized only upon certain prescribed conditions, and after certain things directed have been performed, a failure to perform all the conditions or take all the steps prescribed by the legislature, is not always available as a defense to the bonds, against an innocent purchaser. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. In some cases it may fairly be presumed, in favor of an innocent purchaser, that the conditions have been fulfilled. Such presumption is proper where the county has received, in exchange for the bonds, a certificate for the stock of the railroad company, which it has held for years before suit brought, and still holds. *Pendleton County v. Amy*, 109.
9. Where, under such legislative authority, a county had issued bonds in payment of a subscription to stock of a railway company, and had received in exchange for the bonds a certificate

MUNICIPAL CORPORATIONS—Continued.

for the stock of the railway company, which it held seventeen years before suit was brought, and still continued to hold,—*Held*, that the county was estopped from asserting, against an innocent purchaser of the bonds for value, that the bonds were issued in disregard of the conditions prescribed by the legislature. *Ib.*

10. Where, after bonds of a municipal corporation have been issued and deposited with the treasurer of a state, for the purpose of aiding in the construction of a railway, under authority of a statute of the state, such statute is adjudged unconstitutional by the courts of the state, and the bonds themselves declared void, a proceeding by mandamus to compel the state treasurer to deliver up the bonds to the corporation issuing them should not be stayed because proceedings have been commenced by a stockholder of such railway corporation in a court of the United States to obtain the bonds for the railway company, alleging a refusal by the directors to take such proceedings, if the railway corporation could proceed only in a state court, and would not there be permitted to recover. Such proceedings by the stockholder are a mere evasion of jurisdiction, and it should not be assumed that they will be sanctioned by any court. *People of Michigan ex rel. La Grange Township v. Treasurer of Michigan*, 116.
11. Municipal bonds, issued and deposited with the treasurer of a state, under a statute authorizing such issue and deposit for the purpose of aiding a railway company, are received by him in his official capacity; and where such statute is afterwards adjudged unconstitutional, and the bonds void, he is officially responsible for their safe keeping and return to the makers, when demanded. *Ib.*
12. If the return of the bonds, under such circumstances, is refused, upon a reasonable demand, mandamus is the proper proceeding to compel their return. It is the proper remedy for enforcing a specific legal right, for which there is no other adequate legal remedy, and is not excluded by other legal remedies which are not adequate to secure the specific relief needed, such as replevin; nor by the existence of a specific remedy in equity. A party will not be compelled to give up a legal remedy for an equitable one. *Ib.*

As to the construction and operation of a railway in the streets of a city, see NEGLIGENCE, 2-5.

As to taxation of railway companies by municipal corporations, see TAXES, 2.

NEGLIGENCE.

1. A contractor with a railroad corporation who agrees to build a wharf, and to carry on the work under the direction of the company's engineer, and to his satisfaction, acts as the company's agent, and it is liable for any injury resulting from the negligent manner in which the wharf is constructed or protected. *New Orleans, Mobile, & Chattanooga R. R. Co. v. Hanning*, 242.
2. A street railway, although within the bounds of a public highway, is not itself a "public highway," within the meaning of a statute making the owner of every vehicle running upon any public highway, for the transportation of persons, liable for all damages occasioned by the willful act of any one in his employ as a driver of such vehicle while driving the same; and for any injury resulting from such willful act of the driver of a car upon such a street railway, the owner of the car is not liable. *Whitaker v. Eighth Ave. R. R. Co.*, 476.
3. In an action under such a statute to recover damages for a willful injury inflicted by a driver of the defendant's vehicle, the declarations of the driver are not admissible in evidence against the defendant unless it appears affirmatively that they were made at the time the injury was inflicted. *Id.*
4. The rule that railway companies whose cars are drawn by steam at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines and in the management of their roads, does not apply to street railway companies who are merely carriers of passengers upon street cars drawn by horses. And as to pedestrians using a street in common with a street railway company, no greater degree of care is required of such company than is required of the driver or owner of any other vehicle. *Unger v. Forty-second Street & Grand Street Ferry R. R. Co.*, 481.
5. Thus, a street railway company is not bound, in attaching horses to its cars, to use the best method human skill and ingenuity have devised to prevent accidents. Its duty as to travelers upon the streets as well as to passengers, is discharged if the horses are attached in the way in general use, and which has been found reasonably adequate and safe. And if the horses escape without any fault of the driver or of the company, and injure a person in the street, the company is not liable for the injury. *Id.*
6. In an action against a railroad company to recover for personal injuries received by the plaintiff, it appeared that at the place where the injury was received, the tracks of the defendant and another company were only six or seven feet apart. The plain-

NEGLIGENCE—Continued.

tiff, being in the employ of the other company, was engaged, with others, in replacing a rail upon the track of that company, when a train of cars approached the workmen, unobserved by them until nearly upon them, when they were alarmed by the shouting of a brakeman, and hastily jumped backward to the end of the ties on the defendant's track. While standing there waiting for the train to pass, the plaintiff and one of his fellow-laborers were struck by two freight cars belonging to defendants, which were moving in the same direction as the train on the other road, by their own momentum, having been uncoupled from a train while in motion, and left quietly to run along the track without any person upon them to check their motion or to give an alarm. *Held*, that a verdict for the plaintiff must be sustained. The defendant was chargeable with negligence in the manner of running its cars, and the plaintiff could not be charged with such contributory negligence as would defeat a recovery by him because of his omission, under the excitement and alarm of the occasion, to look along the track of defendant's road to see if there might not be a train approaching, although he had time to do so before the collision. *Chicago, Rock Island, & Pacific R. R. Co. v. Dignan*, 487.

7. In an action against a railway company for negligently causing the death of the plaintiff's intestate, it appeared from the evidence that the deceased, with others, were at work in the employment of another railway company, and at a point upon its track where a train of cars owned and run by defendant was backing; that the bell of the locomotive was ringing; that there were four or five cars in the train and no method of communicating with the engine from the rear of the train; nor was there any brake in working order on the car furthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train; nor was any person in advance of the train to warn others of its approach. The locomotive was in charge of the fireman, the engineer being absent. The other persons employed with the deceased at work on the track stepped off, and some one called to him "look out," when he, instead of stepping back, stepped forward, and was struck and killed. The fireman and one brakeman were the only persons in charge of the train. *Held*, that these facts were sufficient to sustain a verdict in favor of the plaintiff. *Indianapolis, Bloomington, & Western R. Co. v. Curr*, 495.
8. The deceased should not, under such circumstances, be charged

NEGLIGENCE—*Continued.*

with negligence contributing to the injury if he might have seen the approach of the train by the exercise of reasonable care,—as by looking up.—and failed to do so; nor because he did not, when startled by its near approach, act as one not exposed to danger might think he ought to have done. *Id.*

9. In an action to recover damages for injuries received by a child of tender years from the car of a street railway company, while crossing the track, the rule of law as to the defense of contributive negligence is quite different from the rule in cases of injuries to adults. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child; and is to be determined in each case by the circumstances of that case. *Washington & Georgetown R. Co. v. Gladmon*, 500.
10. Running a railway train backward through a public street in a city, in the night-time, without any light or warning at the rear of the train, is negligence which will render the railway company liable for any injury resulting therefrom to a person crossing the track. And where the train has stopped or so nearly stopped as to appear, to one in the rear, to be standing still, starting the train backward from such actual or apparent rest without proper signal or warning, is also negligence on the part of the railway company. An attempt by a traveler, under such circumstances, to cross the track in the rear of the train, is not, as matter of law, negligence contributing to the injury. *Maginnis v. New York Central & Hudson River R. R. Co.*, 506.
11. In an action against a railway company to recover damages for causing the death of a person, whose death had resulted from injuries received by being run over by the defendant's cars, the court charged the jury that if the deceased saw the train approaching, or failed to look in order to see if it was coming, she was herself guilty of negligence, and the plaintiff could not recover. The defendant requested the court to charge that if the deceased could, before placing herself on the track, have seen the approaching train, then her being on the track was, under the circumstances, conclusive evidence of contributory negligence on her part. The court declined to charge that this was "conclusive," but charged that it was high evidence. *Held*, that this charge was as favorable to the defendant as could be justified. The fact that the deceased could have seen "the approaching train" did not necessarily imply

NEGLIGENCE—Continued.

- that she could have seen that it was approaching, and was not conclusive of negligence on her part. *Ib.*
12. A charge in such a case, that if the defendant's employes gave the train a sudden and undue impetus, this was evidence of negligence,—*Held*, correct; the fair import of the instruction being, that if the impetus given was improper, under the circumstances of want of light, signal, or warning, this was evidence of negligence. *Ib.*
 13. In an action to recover damages from a railway company, for injuries to the person of the plaintiff resulting from being struck by the defendant's train, if there is a conflict of evidence as to whether any signals of the approach of the train were given by the defendant, the question is properly one for the jury, and not for the court. *Werner v. New York Central R. R. Co.*, 516.
 14. Merely sounding the whistle of the locomotive—*Held*, not notice of an intended backward movement of a railway train sufficient to absolve the railway company from liability for negligence, where the train was a freight train nearly one thousand feet long, and had been standing in and obstructing a street in a city for a considerable time, yet leaving a narrow space for passage across the track immediately in the rear of the train. *Eaton v. Erie R. Co.*, 524.
 15. In an action to recover from a railway company damages for injuries to the plaintiff's horse, wagon, and other property, the evidence showed that while the defendant's train was standing upon its track partly across a city street, the plaintiff, traveling upon the street with his horse and wagon, and desiring to pass in the rear of the train, asked a man who had got off the train, but who did not appear to be in defendant's employ, if he could pass. He was advised not to do so, as the train might back at any time. Plaintiff waited a few minutes, and then attempted to lead his horse across the track in the rear of the train, when the train moved backward, struck and injured the horse, wagon, &c. *Held*, that this was not contributory negligence on the part of the plaintiff as matter of law, but the question was one of fact for the jury. *Ib.*
 16. In an action against a railroad company, to recover the value of a cow alleged to have been killed by the defendant's negligence, the plaintiff testified that he found the body of the animal the day after she was injured in a field, about twenty or thirty feet from the track, and there were marks on the track indicating such an accident. Another witness saw the cow in the same situation soon after a train had passed; and an employe of the company testified that while riding on the

NEGLIGENCE—*Continued.*

engine he saw a cow thrown from the track at about the same place, during the month the cow was found dead. *Held*, that this evidence was sufficient to connect the company with the injury, and a verdict for the plaintiff should be sustained. *Toledo, Peoria & Warsaw R. Co. v. Pineo*, 534.

As to the liability of carriers for negligence, see also **CARRIERS**.

As to injuries from fire caused by negligence, see **FIRES**.

NUISANCE.

As to when an embankment and bridge of a railway company is a nuisance, and the remedy, see **LANDS**, 27, 28.

PARTIES.

1. A bill filed by stockholders and creditors of a railroad company to set aside a sale of the railroad under an amicable foreclosure of a certain mortgage upon it, effected with the consent of a majority of the stockholders and creditors, which charged collusion in the sale, and prayed for a resale,—*Held*, fatally defective for want of proper parties, because neither the trustees in the mortgage foreclosed nor the consenting stockholders were made parties. *Ribon v. Chicago, Rock Island, & Pacific R. R. Co.*, 285.
2. In a suit in equity to enforce a railway mortgage security against second mortgage interests, holders of bonds of the railway company secured by such second mortgage who are not trustees under the mortgage are proper, but not necessary parties. And the fact that the bill filed is in the nature of a supplemental bill in a former suit does not render it necessary that all the bondholders who were joined in such former suit should be made parties. *Chever v. Rutland & Burlington R. R. Co.*, 291.

PASSENGERS.

As to construction of ticket for conveyance of passengers, see **CARRIERS**, 5.

PAYMENT.

As to what is payment of an instalment of a subscription to corporate stock, see **STOCK**, 6, 7.

PLEADING.

1. In an action upon coupons of railroad bonds payable to bearer, the declaration alleged the plaintiff to be the owner, holder, and bearer of the coupons. *Held*, that a plea that the plaintiff was not, either at the time of filing the declaration or the

PLEADING—*Continued.*

- plea, the owner, holder, or bearer, although faulty as argumentative, was a traverse of a material allegation of the declaration, and must be sustained as against a general demurrer. *Pendleton County v. Amy*, 109.
2. A plea to the same declaration, that at the times named the bonds and coupons were all the property of one R., a citizen of the same state as defendant, and not of any other person,—*Held*, good, upon general demurrer. *Ib.*
 3. The same declaration alleging that the coupons sued on were for interest on bonds that had been issued by a county, and delivered by it to a certain railroad company, in payment by the county of a subscription to stock of the road, under an authority given by acts of the legislature,—*Held*, that a plea that the county did not sign, seal, or deliver the bonds and coupons to the company as alleged, and “so that the alleged acts and coupons are not its acts and deeds,” was good, upon general demurrer. *Ib.*
 4. In proceedings by a railroad company to acquire the right of way for its road over lands owned by individuals, the petition must allege that the taking of such lands for the purposes of the railroad company is necessary for the public use. *Grand Rapids, Newaygo, & Lake Shore R. R. Co. v. Van Driele*, 171.
 5. Where, after an action is commenced against a railway company for injury to lands of the plaintiff, part of the land is sold and conveyed by the plaintiff, the defendant can not avail itself of that fact as a defense unless it be set up by supplemental answer. *Harrington v. St. Paul & Sioux City R. R. Co.*, 216.
 6. In an action against two railroad corporations to recover damages for the killing of a colt owned by the plaintiff, the complaint alleged that “the defendants, by their locomotives and cars then by them run upon their road, at said county and state, run over and upon one colt belonging to the plaintiff,” &c. *Held*, that regarding the cause of action as a tort, or in the nature of a tort, it was sufficient for the complaint to charge that the act complained of was done by the defendants, without showing what relation they sustained to each other, and a recovery might be had against whoever should be shown by the evidence to be liable. *Indianapolis, Cincinnati, & Lafayette R. R. Co. v. Warner*, 537.

PRINCIPAL AND AGENT.

- A contract for the transportation of cattle over a railway was entered into between the shipper and an agent of the railway company, who was its agent only for the purpose of procuring

PRINCIPAL AND AGENT—Continued.

cattle shipments over its road. The contract was made with knowledge on the part of the shipper that, by the ordinary routine of such business as transacted by the company, the money for drawbacks from the freight agreed upon would come to him through the hands of such agent, and to that routine the shipper gave his assent. *Held*, that the agent of the company became the agent of the shipper for the purpose of receiving the money, whether the latter gave him distinct authority so to do or not, and a payment of the money, by the company, to such agent, would exonerate it from any further liability to the shipper in respect thereto. And documentary evidence, tending to prove that the company had paid the money to the agent, was admissible in behalf of the company *Pittsburg, Fort Wayne, & Chicago R. Co. v. Fawcett*, 405.

PROCESS.

As to waiver of defect in service of process, see **ACTION**, 1, 2.

PUBLIC USE.

As to taking private property for railway purposes, as a public use, see **LANDS**, 7.

QUESTIONS OF LAW AND FACT.

As to the distinction between questions of law and questions of fact, see **TRIAL**, 4.

RECEIVERS.

A suit by a receiver of a railroad company, to restrain officers of a state from granting away lands previously granted to the company, may be sustained in a circuit court of the United States, under the general equity jurisdiction of the national courts, and without reliance upon any statute of the state authorizing such suits by receivers. *Davis v. Gray*, 184.

REMOVAL OF CAUSES.

As to removal of causes from courts of a state to United States courts, see **ACTION**, 3, 4.

STATUTES.

As to statutes requiring and regulating the construction of bridges, farm-crossings, fences, &c., see **BRIDGES**; **FENCES**.

Statutes exempting railway corporations from liability for negligence, see **CONTRACTS** 1, 2; **FIRES**, 4; **NEGLIGENCE**, 2, 3.

STATUTES —Continued.

Statutes authorizing the construction of streets across railroad tracks, see **HIGHWAYS**, 5.

Statutes incorporating railway companies, or modifying acts of incorporation, see **INCORPORATION**, 1-8.

Statutes giving a right of action for death caused by negligence, see **JURISDICTION**, 4, 5.

Statutes granting lands to railways, see **LANDS**, 3-5; or authorizing the taking of lands for railway purposes, see **LANDS**, 9-22.

Statutes regulating the location of railways, see **LOCATION**.

Statutes authorizing municipal corporations to aid railways, see **MUNICIPAL CORPORATIONS**.

Statutes taxing railroads, see **TAXES**.

STOCK.

1. The act incorporating a railroad company with a capital of five hundred thousand dollars, authorized the corporators named in the act to call the first meeting of the stockholders whenever one hundred thousand dollars or more of the capital stock should have been subscribed for, "to choose directors and perfect the organization of said corporation." A subsequent clause provided that "whenever said corporation shall have been so organized, it may proceed to commence the construction of the railroad hereinafter specified." More than one hundred thousand dollars having been subscribed to the stock, and a meeting of the stockholders called, directors elected, and the construction of the railroad commenced,—*Hell*, that the fact that the whole capital had not been subscribed for, was no defense to an action by the corporation upon subscriptions to the stock. The provisions of the act of incorporation above cited, could not be construed to require the directors to fill up the stock by procuring further subscriptions, before proceeding with the business for which the corporation was created. The language employed,—“to perfect the organization,”—included merely the choice by the stockholders, and the qualification of the necessary officers; and when so organized, in conformity with the charter, the corporation might legally begin the exercise of its franchise. *New Haven & Derby R. R. Co. v. Chapman*, 1.

2. The act incorporating a railroad company, with a capital of five hundred thousand dollars, provided that there should be at least nine directors of the company. After subscriptions to the capital stock amounting to two hundred and sixteen thousand seven hundred dollars had been made, an amendment to

STOCK—Continued.

the act of incorporation was passed, authorizing a certain city to subscribe two hundred thousand dollars to the capital stock, but providing that two of the officers of the city should be directors of the company, and that in meetings of the stockholders, the city should be entitled to only one vote for every four shares of stock owned by it. *Held*, that the fact that, by the acts of the corporation, in accepting this amendment, and in permitting the city to subscribe for the stock upon the terms stated, the previous subscribers were deprived of the privilege of voting for the two directors appointed by the city, did not discharge such previous subscribers from the obligation of their subscriptions. The rights of which they were deprived were held by them subject to such reasonable changes and regulations as the legislature might make with the assent of the corporation. *Id.*

3. Such an amendment does not belong to the class of laws affecting corporations, which, because they work a radical change in the nature and character of a corporation, or in the purpose for which it was created, are held not binding upon non-consenting members, although assented to by a majority. No change was effected in the character of the corporation, which still remained a railroad company, relating to an important public improvement. The object of its creation,—the construction and operation of a railway,—remained precisely the same. The change made in the mode of appointing the directors was not a radical one, nor, under the circumstances, was it an unreasonable one; and so far from working an injury to previous subscribers, it was a benefit to them. The object of the amendment was not to obstruct, hinder, or change, but to facilitate the enterprise in which all were engaged. *Id.*
4. A section of a state constitution provided that "corporations may be formed under general laws, but shall not be created by special act," except in certain cases; and that "all general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." A statute, passed at a later date, enacted that "the charter of every corporation that shall be hereafter granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." While these provisions were in force, a general railroad law was passed, authorizing the formation of railway companies with thirteen directors. A railway company having been formed under this general law, the legislature authorized a subscription to the stock of the company by a certain city, and enacted that the city should appoint four of the thirteen direc-

STOCK—Continued.

tors. *Held*, that this did not constitute a contract which was violated by a subsequent statute allowing the city to elect seven of the thirteen directors, such a change in the representation of the city having become necessary to preserve the ratio that existed among the subscribers for the stock at the time when the original subscription was made. Nor could the stockholders other than the city claim that the right to elect all the stockholders except four had become vested in them, in such a manner that it was impaired by the statute referred to. *Miller v. State of New York*, 28.

5. The laws of a state required that all railroad companies, before being organized, should have a subscription to their stock of not less than fifty thousand dollars. Certain persons did subscribe more than that sum, with a proviso, however, that if a certain city in its corporate capacity subscribed fifty thousand dollars or upwards, the city should accept what each of them had subscribed above three hundred dollars. The city did subscribe much more than fifty thousand dollars, whereupon the directors of the company, being themselves original subscribers, passed a resolution authorizing the original subscribers to transfer to the city all stock subscribed by them over three hundred dollars each, and that the stock thus transferred be merged in the subscription made by the city, which was done; and thereupon three hundred dollars was paid by each subscriber, and accepted by the company, in full satisfaction. The company having become insolvent, its creditors filed a bill to compel the payment of the excess over three hundred dollars of each of such original subscriptions, and the application of such payments to their judgments. *Held*, that the original subscribers were not liable. The conditions in their subscriptions allowing the transfer to the city could not be held invalid, as such transfer did not lessen the capital of the company, nor deprive the state, the creditors, or other stockholders of any security or protection. And the fact that the directors were original subscribers did not affect the case; the transfer having been in accordance with the conditions on which the original subscription was made, and in itself fair. *Burke v. Smith*, 37.
6. Under a statute providing for the incorporation of railway companies,—which requires at least one thousand dollars stock to be subscribed for each mile of the proposed railroad, and ten per cent. thereof, in cash, to be actually and in good faith paid in before incorporation (*Cal. Stat.* 1861, 607),—such requirements are not merely directory, but are conditions precedent, the performance of which is essential to the validity of the act

STOCK—Continued.

- of incorporation. *People of California ex rel. Plumas County v. Chambers*, 49.
7. A payment of the ten per cent. required, in a check upon a bank, drawn by a person who has not on deposit in such bank funds sufficient to meet the check, is not a payment in cash, as required by the statute, even though such check would have been paid by the bank if presented; and an incorporation founded on such payment is invalid, and will be so declared on *quo warranto*. *Ib.*
 8. In an action upon a subscription to the stock of a railway company, the production in evidence of the writing declared upon, is not rendered unnecessary by a statute which provides that in any action upon a written instrument claimed to have been executed or entered into by the defendant, and which is described or recited in the declaration, the plaintiff shall not be required to prove the execution or delivery of such instrument, unless the defendant, at the time of pleading, shall file notice in writing that he denies such execution or delivery; even though no such notice has been filed by the defendant. *New York, Housatonic, & Northern R. R. Co. v. Hunt*, 56.
 9. The charter of a railroad company provided that no installments of subscriptions to its capital stock, after the first, should be called for until at least five hundred thousand dollars of the capital stock should be subscribed. After such subscriptions to the amount of two hundred thousand dollars had been made, a contractor agreed with the company to construct its road, and to accept in part payment, on the completion of the road, three hundred thousand dollars in its capital stock. The contractor afterward became insolvent, and failed to fulfill his contract. In an action by the company, to recover installments from one of the subscribers to the stock,—*Held*, that such agreement by the contractor was not a subscription to the stock within the meaning of the charter. *Ib.*
 10. The associates in a railroad company, who, acting under a statute authorizing their incorporation, had elected and held meetings of directors as well as of stockholders; had made assessments upon the subscriptions to the capital stock, and collected them in part, had assigned a portion of the road for construction, and proceeded to construct the same; and had done various other acts as a corporation, and expended large amounts of money in furtherance of the object for which the company was formed, without interference by the public authorities,—*Held*, a corporation *de facto*, even if not a corpora-

STOCK—*Continued.*

tion *de jure*; and capable, as such, to maintain an action for an unpaid balance of a subscription against one of the incorporators who had acted with the others in claiming and exercising corporate powers. *Swartwout v. Michigan Air Line R. R. Co.*, 68.

11. In such an action, questions whether there has been exact regularity and strict compliance with the provisions of the law authorizing the incorporation can not be raised. Such questions concern the state rather than individuals, and should only be raised in a proceeding to which the state has seen fit to make itself a party. *Ib.*
12. But a railroad company, although a corporation *de facto*, and entitled as such to maintain actions, can not recover upon subscriptions to its stock, without showing performance of all acts which are made, by the statute authorizing its incorporation, conditions precedent; as the procuring of subscriptions to the capital stock to a certain amount. *Ib.*
13. Where the legislature has authorized a railroad company to proceed in the construction of a division of its line, and to collect the subscriptions to its stock made along such division, so soon as a certain amount of subscriptions assessable for the construction of such division is obtained, reckoning as part of that amount such aid as may be voted by any municipality along such division, the fact that such municipal aid is afterwards held void by the courts does not affect the authority to proceed with the construction of such division. That the conditions prescribed by the legislature to the exercise of corporate powers have proved of no value, does not take away the powers conferred. *Ib.*
14. Where, by such a statute, a railroad company is authorized, when subscriptions, &c., sufficient to construct a division of its line, of a specified length, at a certain rate per mile, have been obtained, to proceed to elect directors, who may designate such a division for construction, and assess and enforce collections of its capital stock subscribed by persons residing along, collateral to, or within a certain distance of either terminus of such designated division, an action for an assessment upon such subscription can not be maintained without proof that the necessary subscriptions had been obtained between the two termini, or within the required distance from them, of the division designated and set apart. *Ib.*
15. It is no defense to an action for an assessment upon subscriptions to stock, that stock has been awarded to persons whose names were not on the stock book, or to those who had not

STOCK—Continued.

- actually paid in the instalment required on subscribing; one who has received what he subscribed for can not complain of an award to those who could not have compelled it. *Ib.*
16. It is not a bar to an action to recover an assessment upon subscription to the stock of a railroad company that, pending the action, the plaintiff consolidated with another company. The cause of action does not die but passes to the new company, and this objection, if valid in any form, should be considered matter in abatement merely, and should be pleaded accordingly. *Ib.*
17. An arrangement, between the officers of a railroad company and a portion of its subscribers, that if the town in which they reside voted a certain amount of municipal aid, such subscribers, upon paying a certain percentage of their subscription, should be released from the balance, being one in effect to release a portion of the subscriptions without authority of law, is void. *Ib.*
18. A subscription to stock of a railroad, made upon condition "that the line of the road shall be located and built within one mile of" a specified point, is assessable when the road is finally located within one mile thereof, although not yet constructed. *Ib.*
19. Where a statute, empowering a town to subscribe to the stock of a railroad company, when authorized by a majority of the legal voters therein, requires the town supervisor to make the subscription if it be so voted, but leaves the question of subscription wholly to the determination of the voters, the town may, in determining that question, impose conditions upon its subscription, although a conditional subscription is not expressly authorized by the statute. And, if conditions are imposed, the town supervisor has no power to disregard them, nor can the railroad company compel him, by mandamus, to make an unconditional subscription. *People of Illinois ex rel. Chicago & Rock River R. R. Co. v. Dutcher*, 108.
20. One who, with his hired men and horses, had rendered services in the construction of a railway to the contractors with the railway company for its construction, upon the failure of the contractors to pay him, brought his action against the company, as the laws of the state in such cases permitted (*N. Y. Laws of 1850*, ch. 140, § 12), and recovered judgment, execution upon which was returned unsatisfied. Afterwards he brought an action against one whom he alleged to be a stockholder in the railway company, under a statute which provided that each stockholder of such a company should be "individually liable

STOCK—Continued.

to the creditors of such company, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company;" and that all the stockholders should be "jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company; but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation." Upon these provisions—*Held*,

1. That no action could be sustained by the plaintiff independent of his judgment; under the first clause, because he was not a creditor of the company, but of the contractors; nor under the second clause, because he was not himself a laborer or servant of the company.

2. That effect could only be given to the judgment, either by treating it as conclusive evidence of a debt existing when the action was brought, or as itself a debt, constituting the plaintiff a creditor of the company at and from the date of the recovery. Upon the first theory, the defendant in this case could not be held liable, as the debt would be barred by the statute of limitations; nor could he be held upon the second theory, as before the rendition of the judgment he had ceased to be a stockholder. *McMahon v. Macy*, 398.

21. In an action, under such a statute, to enforce the liability thereby imposed upon a stockholder, evidence is admissible upon the part of the defendant, to show that an assignment of stock, absolute upon its face, was in fact given to him as collateral security, and was held by him for that purpose only. *Ib.*

22. *It seems*, that, in such an action, proof of a judgment against the company is neither conclusive nor *prima facie* evidence of the existence of a debt against the company. Even if such a judgment were deemed *prima facie* evidence of such indebtedness, where it appears that an inseparable part of the judgment was for labor and services not performed by plaintiff himself, it is not a debt for which a stockholder is liable, and plaintiff, therefore, could not recover. *Ib.*

STREET RAILWAYS.

As to liability of street railway companies for injuries caused by negligence see NEGLIGENCE, 2-5.

SUBSCRIPTIONS.

As to subscriptions to the stock of a railway corporation, see MUNICIPAL CORPORATIONS, 6, 7; STOCK, 1-19.

TAXES.

1. The power of a state to tax lands sold by the United States before the government has parted with the legal title by issuing a patent, extends only to cases where the right to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right. *Kansas Pacific R. Co. v. Prescott*, 186.
2. A provision of a city ordinance requiring every railroad or express company doing business within the city, and having a business extending beyond the state, to pay an annual license, is not repugnant to the provision of the constitution of the United States which vests in Congress the power to regulate commerce among the several states. *Osborne v. Mobile*, 364.
3. Bonds issued by a railway company are property in the hands of the holders; and when held by non-residents of the state by which the company was incorporated, they are beyond the jurisdiction of the state, and are not subject to its power of taxation. *Cleveland, Painesville, & Ashtabula R. R. Co. v. State of Pennsylvania*, 868.
4. Hence a state law which requires the treasurer of a railway company, incorporated by and doing business within the state, to retain a percentage of the interest due upon bonds of the company, made and payable out of the state to non-residents, citizens of other states, and held by them, is not a legitimate exercise of the taxing power of the state. It is a law which interferes between the company and the bondholders, and, under pretense of levying a tax, commands the company to withhold a portion of the stipulated interest and pay it over to the state; thus impairing the obligation of the contract between the parties. *Id.*
5. The facts that such bonds are secured by a mortgage, executed simultaneously with them, upon property of the railway company situated within the state, does not render the bonds liable to taxation by the state, under such a law. *So held*, in regard to a statute of Pennsylvania, in which state a mortgage, though in form a conveyance, is held to be a mere security for a debt, and transfers no estate in the mortgaged premises. Such a right has no locality independent of the party in whom it resides. *Id.*
6. Cars owned and used by a railway company upon its tracks are personal property, and liable to be seized and sold as such for

TAXES—Continued.

the collection of a tax against the company. *Randall v. Howell*, 882.

TICKETS.

As to the construction and effect of passengers' tickets, see **CARRIERS**, 5.

TRACKS.

Where a statute authorized the construction of streets and highways across a "railroad track," without compensation to the owners of the track—*Held*, that the word "track" should be limited to the track used for public traffic and for turn-outs and switches, and did not include tracks used for storing cars, or exclusively for making up trains. But a finding that certain tracks across which it was proposed to lay out a street were in "constant use for passing trains, and for switching off cars and making up trains," would not relieve the premises from the operation of the statute. *Boston & Albany R. R. Co. v. Greenbush*, 886.

TRIAL.

1. In proceedings to which a railroad corporation is a party, general propositions in a charge to the jury that corporations are naturally grasping and avaricious, and other remarks of like character, with a caution to the jury not to be influenced by such considerations, are not, on appeal, ground for reversal, where no application of such remarks is made by the judge to the parties or to the facts of the particular case. Even if erroneous, such propositions upon abstract questions are not ground for reversal. *Minnesota Valley R. R. Co. v. Doran*, 187.
2. In proceedings to determine the compensation to be awarded for land taken for railway purposes, the court may, in its discretion, send the jury to view the land in question. *King v. Iowa Midland R. R. Co.*, 199.
3. A request by counsel for an instruction to the jury which assumes as existing facts not proved should not be granted. *Washington & Georgetown R. Co. v. Gladmon*, 500.
4. In an action to recover damages from a railway for injuries to the person of the plaintiff resulting from being struck by the defendant's train, if there is a conflict of evidence as to whether any signals of the approach of the train were given by the defendant, the question is properly one for the jury, and not for the court. *Warner v. New York Central R. R. Co.*, 516.
5. Upon the bringing in of a sealed verdict by a jury, the entry

TRIAL—Continued.

made by the clerk in his book of minutes is not such a recording as renders the verdict unalterable. Where a jury, authorized so to do, brought in a sealed verdict in favor of the plaintiff, which was entered upon the clerk's minutes, but upon polling them they did not agree, the court directed them to return to their room. They retired, but came in again for instructions as to whether they could increase the verdict. The court instructed them that they might render such verdict as they thought proper, whereupon they brought in a verdict for the plaintiff for a larger amount. *Held*, that this was not error for which the verdict should be set aside. *Id.*

As to mode of trial of appeals from awards of compensation for lands taken for railway purposes, see **LANDS**, 11.

TRUSTEES.

As to rights and powers of trustees in railway mortgages, see **MORTGAGES**, 4-11.

VERDICT.

As to the form and entry of verdict, see **TRIAL**, 5.

WAIVER.

As to waiver of defects in service of process, see **ACTION**, 1, 2.

As to waiver of rights of mortgagees, see **MORTGAGES**, 11.

WAREHOUSEMAN.

As to when carrier of goods is liable as warehouseman only, see **CARRIERS**, 2.

WITNESSES.

As to refreshing memory of witnesses, see **EVIDENCE**, 7.



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